No. 15-_____

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law.

The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Angel Peña Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1a) is published at 350 P.3d 287. The opinion of the Colorado Court of Appeals (Pet. App. 28a) is published at 2012 COA 193. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 18, 2015. Pet. App. 1a. The Colorado Supreme Court denied rehearing on June 15, 2015. Pet. App. 87a. On September 10, 2015, Justice Sotomayor extended the time to file this petition for a writ of certiorari to and including November 12, 2015. *See* No. 15A265. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This case presents a fundamental question concerning the ability of defendants to vindicate their Sixth Amendment right to an impartial jury. At petitioner's criminal trial, a juror injected racial animus into the deliberations – urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. Pet. App. 4a-5a. After learning of these statements, petitioner sought a new trial, claiming a violation of his constitutional right to an impartial jury. But a bare majority of the Colorado Supreme Court – deepening a conflict over the issue – held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict.

1. In May 2007, a man entered a women's bathroom at a horse-racing track in Colorado and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks.

The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to petitioner Miguel Angel Peña Rodriguez. Their father then

reported the incident to on-site security personnel, who contacted the police.

The police pulled petitioner over late that night. They conducted a show-up with petitioner standing on the side of the road and each girl about fifteen feet away, looking through the window of a police cruiser. Both girls identified petitioner as the man who had assaulted them.

2. a. The State charged petitioner with four offenses relating to the incident: one felony count of attempted sexual assault on a victim less than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Pet. App. 3a. Petitioner insisted he had been misidentified and demanded a trial.

At voir dire, the trial court and the parties repeatedly asked potential jurors whether they could be "fair" or would "have a feeling for or against" petitioner. Pet. App. 3a. None of the impaneled jurors indicated, in response to these questions, that he or she harbored any racial bias. *Id.*

During trial, the prosecution presented no forensic evidence, focusing instead on pretrial and in-court identifications by the victims. Defense counsel highlighted the short amount of time during which the victims saw their attacker, the suggestibility of the nighttime show-up, and the presence of other Hispanic workers in the area. And petitioner presented an alibi witness, a co-worker – also Hispanic – who testified that he was with petitioner in one of the barns when the charged offenses occurred. Tr. 17 (Feb. 25, 2010). The prosecution responded by urging the jury to "[w]eigh the

credibility of the girls against [the credibility of the alibi witness]." *Id.* 48.

The jury was initially unable to reach a verdict on any of the charges. In response, the judge provided the jurors with Colorado's version of an *Allen* charge – an admonition to keep deliberating to try to reach unanimity. After twelve total hours of deliberations, the jury convicted petitioner on the three misdemeanor charges. Pet. App. 3a. It was unable to reach a verdict on the felony charge. *Id.*

b. After the jurors were dismissed, defense counsel remained in the courthouse to speak with them. Two jurors stayed longer to talk to defense counsel privately. They explained that, during deliberations, another juror had "expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic." Pet. App. 4a (alteration in original).

Shortly thereafter, petitioner asked the court for permission to contact the jurors to obtain affidavits regarding the alleged racially biased statements. The court provided contact information and counsel secured affidavits from the two jurors.

Both affidavits related a number of racially biased statements made by "Juror H.C." In particular, Juror H.C. allegedly said during deliberations:

- "[The defendant] did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a.
- "[The defendant] was guilty because in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that

caused them to believe they could do whatever they wanted with women." *Id.*

- "Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*
- "[W]here [Juror H.C.] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*
- "[T]he alibi witness [wasn't] credible because, among other things, he was 'an illegal.'" *Id.* 4a-5a. (The witness had testified during trial that he was a legal resident of the United States. Tr. 14 (Feb. 25, 2010).)

After receiving the affidavits, the trial court acknowledged that Juror H.C. "appear[ed] to be biased based on what he said in the jury room." Tr. 3 (July 20, 2010). But the trial court determined that the juror's expressions of racial animus could "not form the basis of a new trial" because Colorado's no-impeachment rule, codified at Colorado Rule of Evidence (CRE) 606(b), prohibits inquiry into "what happens in the jury room." *Id.*[1]

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[1] CRE 606(b), which is substantively identical to Federal Rule of Evidence 606(b), provides that "[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify" – save narrow exceptions not relevant here – "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in

c. Petitioner was sentenced to two years' probation and was required to register as a sex offender. Tr. 24-25 (Nov. 23, 2010).

3. A divided panel of the Colorado Court of Appeals affirmed. Pet. App. 29a. The dissent would have held that "CRE 606(b) must yield to the Sixth Amendment right of [the] defendant." *Id.* 65a. Accordingly, it would have "reversed [petitioner's] conviction and remand[ed] for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt." *Id.*

4. The Colorado Supreme Court affirmed by a 4-3 vote.

The majority acknowledged that this Court has stated that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. Pet. App. 16a n.6 (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014)). In *Warger* and *Tanner v. United States*, 483 U.S. 107 (1987), this Court held that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively, that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial. This Court explained that requiring courts to consider testimony on those topics was unnecessary because other safeguards allowed defendants in such situations to adequately protect their right to an impartial jury.

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connection therewith. . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

See Warger, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. These safeguards were: (1) the ability of trial courts and counsel to observe jurors for signs of misconduct during trial; (2) the potential availability of nonjuror evidence of juror misconduct; (3) the ability of jurors to report misconduct before they reach a verdict; and (4) the ability of judges and counsel to question jurors about potential bias during voir dire. *See id.* But, as the Colorado Supreme Court acknowledged, "neither *Tanner* nor *Warger* involved the exact issue of racial bias." Pet. App. 14a.

Turning to that issue, the majority admitted that at least one of the *Tanner* safeguards (the ability of the court and defense counsel to observe jurors during trial) was unlikely to uncover racial bias. Pet. App. 15a. But the majority held that the "remaining *Tanner* safeguards [are] sufficient to protect a party's constitutional right[]" to a jury untainted by racial animus. *Id.* In addition, the Colorado Supreme Court expressed concern over the policy implications of recognizing a constitutional exception to CRE 606(b). It worried that creating an exception for racial bias would encourage lawyers to harass jurors after trial. *Id.* 15a. The majority was also unable to "discern a dividing line between different *types* of juror bias" and between biased comments of varying "severity." *Id.* 14a-15a. Finally, it feared that "the very potential" for investigation into claims of racial bias "would shatter public confidence in the fundamental notion of trial by jury." *Id.* 13a.

Justice Márquez dissented, joined by Justices Eid and Hood. Pet. App. 16a. Noting that courts are "split" on whether the Sixth Amendment permits no-impeachment rules to bar any consideration of

evidence of racial bias offered to prove a violation of the right to an impartial jury, *id.* 23a n.4, Justice Márquez maintained that the better view is that such rules "must yield to the defendant's constitutional right to an impartial jury," *id.* 18a. She detailed the ways in which the *Tanner* safeguards are "not always adequate to uncover racial bias before the jury renders its verdict." *Id.* 22a-23a. In addition, Justice Márquez argued that the majority's reasoning improperly "elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial," thereby undermining "public confidence in our jury trial system." *Id.* 18a.

5. The Colorado Supreme Court denied rehearing, with two justices noting that they would have granted the petition. Pet. App. 87a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are intractably divided over whether the Sixth Amendment permits "no impeachment" rules to bar juror testimony regarding racially biased statements made during deliberations when offered to prove a violation of the right to an impartial jury. The Court should use this case – with a clean set of facts arising on direct review – to resolve the conflict on this manifestly important question and hold that no-impeachment rules cannot bar courts from considering juror affidavits to determine whether racial bias unconstitutionally infected jury deliberations.

I. Federal And State Courts Are Intractably Divided Over Whether The Sixth Amendment Requires Consideration Of Juror Testimony That Racial Bias Infected Deliberations.

Most states' no-impeachment rules, like Federal Rule of Evidence 606(b), render jurors incompetent to testify as to any statement made during deliberations evincing any sort of "bias" or partiality on the part of jurors. *See Warger v. Shauers*, 135 S. Ct. 521, 529-30 (2014) (federal rule); Benjamin T. Huebner, Note, *Beyond* Tanner: *An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1487, app. (2006) (state rules). Nonetheless, this Court has cautioned that "there might be instances in which such testimony . . . could not be excluded 'without violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (1 How.) 361, 366 (1851)). And just last Term – confronted with the argument that construing Rule 606(b) in such a categorical manner would render it unconstitutional as applied to claims of racial bias, *see* Tr. of Oral Arg. at 20, 31-32, 43, *Warger*, 135 S. Ct. 521 (No. 13-517) – this Court reserved the question whether "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Warger*, 135 S. Ct. at 529 n.3.

Courts have become openly and sharply divided over this question. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1153 & n.9 (D.C. 2013) (detailing the split); *State v. Brown*, 62 A.3d 1099, 1109-10 (R.I. 2013) (same); Pet App. 23a n.4 (Márquez, J., dissenting) (same). The Colorado Supreme Court

here joined one federal court of appeals and one state court of last resort in holding that no-impeachment rules are constitutional even when applied to juror testimony regarding racially biased statements. *See* Pet. App. 16a. By contrast, two federal courts of appeals and seven state courts of last resort hold – as the dissent contended below – that the Sixth Amendment prevents courts from barring juror testimony on such statements.

1. *The minority view.* In holding that excluding testimony of racially biased statements made during deliberations does not raise a constitutional problem, the Colorado Supreme Court embraced the position previously adopted by the Tenth Circuit and the Pennsylvania Supreme Court.

In *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009), the government prosecuted a Native American for assault. Following trial, a juror alleged that the foreman had said during deliberations that "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent." *Id.* at 1231 (alteration in original). The district court granted a new trial on this basis, but the Tenth Circuit reversed and reinstated the conviction. *Id.* at 1241-42. After making clear that Rule 606(b) applied to the juror's testimony, *id.* at 1234-38, the Tenth Circuit rejected the argument "that Rule 606(b) is unconstitutional as applied in a case" in which "racially biased statements were made" during deliberations, *id.* at 1241. That left the defendant with no admissible evidence to support his Sixth Amendment claim. *Id.* at 1233; *see also United States v. Benally*, 560 F.3d 1151 (10th Cir. 2009)

(denying rehearing en banc, with three judges dissenting).

In *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008), the Pennsylvania Supreme Court likewise refused to recognize an exception to the state's no-impeachment rule for juror testimony regarding racial bias. Rejecting a defendant's argument that his "right to a fair and impartial jury [was] violated" by a juror's "troubling" statements indicating racial bias, the Pennsylvania Supreme Court held that Pennsylvania's Rule 606(b) barred the juror's testimony. *Id.* at 807-08; *see also Smart v. Folino*, No. 3:CV-10-1447, 2015 WL 1525528, at *6-8 (M.D. Pa. Apr. 2, 2015) (observing that *Steele* precludes Pennsylvania courts from creating a constitutional exception to the state's no-impeachment rule with respect to racially biased statements).[2]

2. *The majority view.* The First Circuit, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), rejected the Tenth Circuit's analysis in *Benally* and articulated the majority position. Following the

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[2] Two more federal courts of appeals have indicated that they would refuse to hold a no-impeachment rule unconstitutional as applied to juror testimony regarding racial bias. *See Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003) (declining to afford habeas relief because "the Supreme Court's decision in *Tanner* implies that the Constitution does not require the admission of evidence [of racial bias] that falls within Rule 606(b)'s prohibition"); *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (holding – in response to a juror's allegation that "certain prejudices" had infected the jury's deliberations – that a jury's "verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations").

conviction of a Hispanic man for robbery, one juror alleged that another had said, during deliberations, "I guess we're profiling but they cause all the trouble." *Id.* at 78. The First Circuit acknowledged that the juror's testimony fell within Rule 606(b)'s prohibition. *Id.* at 84. But the First Circuit nonetheless remanded the case to the district court with instructions to consider the juror's allegations, holding that when defendants allege "racial or ethnic bias during jury deliberations," courts must assess – "under the Sixth Amendment and the Due Process Clause of the United States Constitution" – "whether there is a substantial probability that any such comments made a difference in the outcome of the trial." *Id.* at 79, 87-88.[3]

The Rhode Island Supreme Court likewise has rejected *Benally*. In *State v. Brown*, 62 A.3d 1099 (R.I. 2013), several jurors alleged that another had referred to the Native American defendants as "those

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[3] Courts sometimes describe the constitutional concern here in terms of "due process" because "[t]he right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986) (plurality opinion). There is no difference, however, between the two sources of the right. This Court originally characterized the right to an impartial jury in state criminal cases as guaranteed by due process because it had not yet held that the Sixth Amendment's explicit guarantee of an impartial jury applied to the states. *See Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). Once this incorporation was achieved, the Court made clear that the right emanated equally from the Sixth Amendment and the Due Process Clause. *See Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

people" and had mockingly beat water bottles "like tom-tom drums." *Id.* at 1110. Adopting the First Circuit's analysis in *Villar*, the Rhode Island Supreme Court explained that Rule 606(b) could not "preclude the admission" of juror testimony on racial bias during deliberations "where necessary to protect a defendant's right to a fair trial by an impartial jury – a right guaranteed by the federal and state constitutions." *Id.* It therefore upheld the trial court's decision to consider whether the statements demonstrated that "racial bias infected the jury's deliberative process." *Id.* at 1107, 1110.

The D.C. Court of Appeals similarly has rejected *Benally*. In *Kittle v. United States*, 65 A.3d 1144 (D.C. 2013), a juror's post-verdict letter to the trial judge stated that some of the other jurors had felt that "all 'blacks' are guilty regardless." *Id.* at 1147-48. The D.C. Court of Appeals concluded that the Sixth Amendment impartial jury right requires a "constitutional exception" allowing courts "to consider juror testimony in certain 'rare and exceptional circumstances' where claims of racial or ethnic bias amongst jurors implicate the defendant's right to trial by an impartial jury." *Id.* at 1152, 1155-56 (quoting *Villar*, 586 F.3d at 88).

The Massachusetts Supreme Judicial Court has repeatedly determined that the Sixth Amendment requires consideration of juror testimony alleging racially biased statements "because 'the possibility . . . that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored.'" *Commonwealth v. McCowen*, 939 N.E.2d 735, 763-64 (Mass. 2010) (quoting *Commonwealth v. Laguer*, 571

N.E.2d 371, 376 (Mass. 1991)). In *Laguer*, for example, the defendant submitted a post-trial affidavit from a juror alleging that "[t]he jury deliberations were plagued by racism." 571 N.E.2d at 375. Even though the state's no-impeachment rule covered this evidence, the Massachusetts Supreme Judicial Court ordered the trial court to hold an evidentiary hearing and instructed that "[i]f the affidavit is found to be essentially true in that regard, the defendant shall be entitled to a new trial." *Id.* at 377.

One other federal court of appeals and four more state courts of last resort have aligned themselves with the majority view, invoking the Constitution to hold that no-impeachment rules cannot bar evidence of racial bias offered to show violations of the right to an impartial jury. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (7th Cir. 1987) (even though juror testimony that racial bias infected jury deliberations falls within Rule 606(b), "due process" requires courts to determine "whether there [was] a substantial probability that the alleged racial slur made a difference in the outcome of the trial"); *Fisher v. State*, 690 A.2d 917, 918, 920 (Del. 1996) (federal constitutional "right to trial by an impartial jury" requires consideration of juror testimony indicating that "the issue of race was improperly considered" during deliberations); *Spencer v. State*, 398 S.E.2d 179, 184-85 (Ga. 1990), ("'due process'" requires courts to "disregard[]" the no-impeachment rule when necessary to determine whether "racial bias materially affected the jury's decision to convict" (quoting *Shillcutt*, 827 F.2d at 1159)), *cert. denied*, 500 U.S. 960 (1991); *State v. Hidanovic*, 747 N.W.2d 463, 473-74 (N.D. 2008) ("federal constitutional right

to a fair trial by an impartial jury" requires courts to consider "evidence of racial and ethnic bias" that "would otherwise be inadmissible under a rule similar to N.D.R.Ev. 606(b)"); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) ("due process" requires no-impeachment rule to yield in cases involving "allegations of racial prejudice" during deliberations (citing *Shillcutt*, 827 F.2d at 1159)).[4]

3. Until now, this Court has not been presented with the full scope of the split over the question presented. Although the defendant sought certiorari in *Benally*, his petition did not identify any of the state courts of last resort on either side of the divide; it set forth only a two-to-one split among the federal courts of appeals. *See* Petition for Writ of Certiorari at 16-17, *Benally*, No. 08-4009. And following the denial of that petition, three new jurisdictions have joined opposite sides of the split. *See* Pet. App. 16a (decision below; following *Benally*); *Kittle*, 65 A.3d 1144 (rejecting *Benally*); *Brown*, 62 A.3d 1099 (same). Once all of these cases are taken into account, it is clear that more than sufficient percolation has

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[4] The Ninth Circuit and the Wisconsin Supreme Court also have suggested their support for this position. *See United States v. Henley*, 238 F.3d 1111, 1120-21 (9th Cir. 2001) (finding "persuasive those cases that have exempted evidence of racial prejudice from Rule 606(b)'s juror incompetency doctrine," including those decided on Sixth Amendment grounds); *State v. Shillcutt*, 350 N.W.2d 686, 695 (Wis. 1984) (indicating that constitutional considerations would require a no-impeachment rule to yield when there is a "'substantial likelihood' that the defendant was prejudiced by the influence of racial bias in the jury room").

occurred, and that there is no hope of uniformity unless this Court intervenes.

Indeed, the crux of the conflict involves a question only this Court can answer: how the factors this Court enunciated in *Tanner* apply to juror testimony regarding racial bias. Some courts believe that "[t]he safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases." *Benally*, 546 F.3d at 1240. Others, holding that no-impeachment rules cannot constitutionally be applied in this setting, have highlighted what they see as "the shortcomings of the *Tanner* protections in preventing the influence of jurors' racial or ethnic bias on a verdict." *Kittle*, 65 A.3d at 1155. Lower courts have forthrightly "struggled" over this issue long enough, *Villar*, 586 F.3d at 85, and now need "a clear command from the Supreme Court," Pet. App. 16a n.6.

II. The Question Presented Is Critically Important To The Administration Of Criminal Justice.

The question presented merits this Court's attention. This Court has repeatedly granted certiorari to craft and refine rules aimed at preventing racial bias from seeping into the jury room. *See, e.g.*, *Foster v. Chatman*, No. 14-8349 (argued Nov. 2, 2015) (prosecutor's use of peremptory challenges based on race); *Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (same); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (same); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (defendant's use of peremptory challenges based on race); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (ability to ask questions at voir

dire regarding racial bias in capital case); *Rose v. Mitchell*, 443 U.S. 545, 547 (1979) (racial bias in selection of grand jury foreman); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (ability to ask questions at voir dire regarding racial bias in non-capital case).

The same imperative for this Court's guidance exists here. The right to trial by an impartial jury is a cornerstone of our system of criminal justice, ensuring "tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Thus, when racial prejudice infects a jury's decision whether to convict, the integrity of the criminal justice system is brought "into direct question," *Rose*, 443 U.S. at 563 (1979). Whatever conciliation must be made between that grave threat to the legitimacy of the criminal justice system and the interest in preserving "the secrecy of jury deliberations," Pet. App. 2a, should come from this Court – not an inconsistent hodgepodge of lower court cases.

III. This Case Presents An Ideal Vehicle For Resolving The Conflict.

For two reasons, this case is a particularly suitable vehicle for resolving whether a no-impeachment rule can bar evidence of racial bias during deliberations offered to prove a violation of the right to an impartial jury.

First, this case arises on direct review from the denial of petitioner's motion for a new trial. It thus possesses none of the complications that often accompany habeas cases. In addition, petitioner properly presented his constitutional claim in the state-court system, *see* Pet. App. 11a n.5, and the

majority and dissent in the Colorado Supreme Court engaged in robust discussion on the merits, *see id.* 11a-27a.

Second, if this Court holds that a no-impeachment rule is unconstitutional as applied to evidence of racial bias during deliberations, petitioner will likely be entitled to a new trial. The juror affidavits he submitted, in conjunction with the circumstances of his trial, indicate that racial bias influenced the jury's decision to convict him. Juror H.C. did not just utter an offhand comment related to race. Instead, his alleged statements "were directly tied to the determination of the defendant's guilt." Pet. App. 26a (Márquez, J., dissenting). He conveyed a strong belief that Hispanics are more likely to be guilty of the crimes with which petitioner was charged and discounted petitioner's defense because he erroneously assumed that the alibi witness was "an illegal." *Id.* 4a-5a.

What is more, the jury was initially deadlocked on all four charges, reaching a verdict on three of them only after the judge admonished the jurors to keep deliberating. The jury's difficulty in reaching a decision may have "liberat[ed]" it to rely on non-evidentiary factors such as race. *Cf.* Harry Kalven, Jr. & Hans Zeisel, The American Jury 164-65 (1966) (suggesting that jurors may rely on nonevidentiary factors in cases where the evidence is close); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 Law & Soc'y Rev. 423, 434-37 (1986) (extending this theory to cases of sexual assault).

IV. The Colorado Supreme Court's Decision Is Incorrect.

Contrary to the Colorado Supreme Court's holding, a no-impeachment rule is unconstitutional when applied to juror testimony regarding racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

A. Courts Cannot Adequately Protect The Sixth Amendment Right To A Jury Free Of Racial Bias Without Post-Verdict Juror Testimony.

This Court has consistently made clear that rules of evidence – even rules with deep common-law pedigree – must yield when necessary to effectuate a criminal defendant's Sixth Amendment or due process rights. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for example, the Court held that the Sixth Amendment and Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness insofar as those rules bar reliable testimony vital to ascertaining guilt. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" over the centuries than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.*; *see also Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (reaffirming *Chambers*).

Similarly, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the categorical rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must

yield to the "constitutional right to testify in [one's] own defense" when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. Finally, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Sixth Amendment trumps the common-law rule precluding defendants from calling alleged accomplices to testify on their behalf. *Id.* at 20-23. Despite the rule's venerable origins predating the founding era, this Court explained that the rule must give way when necessary to vindicate the right enshrined in the Compulsory Process Clause allowing defendants to secure testimony "relevant and material to the defense." *Id.* at 23.

The same basic analysis applies here: when a no-impeachment rule precludes a court from considering evidence that racial bias infected jury deliberations, the rule infringes on the right to an impartial jury without sufficient justification.

1. There can be no dispute that the Sixth Amendment right to an impartial jury is violated where a juror expresses an intention to convict based on "racial animus." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Injecting such prejudicial reasoning into the jury room strikes at the heart of the constitutional commitment to "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The only question, therefore, is whether barring post-verdict juror testimony concerning racial bias during deliberations unduly impedes this right. We now turn to that question.

2. This Court has held that the Sixth Amendment permits no-impeachment rules to bar

testimony regarding a juror's intoxication or a juror's bias against a party because her daughter had caused a car accident similar to the one at issue. *See Tanner v. United States*, 483 U.S. 107, 113-15, 127 (1987); *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014). This Court did not question the reliability or probative value of such juror testimony. But the Court identified four "aspects of the trial process" – now known as the *Tanner* factors – that generally allow defendants in those situations to effectuate their right to an impartial jury while still preserving the secrecy of jury deliberations. *Id.* These safeguards are: (1) the ability to observe the jury during trial; (2) the ability to consider evidence besides juror testimony concerning misconduct during deliberations; (3) the ability of other jurors to report misconduct before a verdict; and (4) the ability to inquire into potential bias during voir dire. *Id.*

At the same time, this Court has stressed that "there might be instances in which such testimony of . . . juror [misconduct] could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (1 How.) 361, 366 (1851)). And again last year, this Court suggested that "[t]here may be cases of juror bias so extreme" that applying the no-impeachment rule would run afoul of the Sixth Amendment. *Warger*, 135 S. Ct. at 529 n.3.

For two reasons, racial bias is the extreme case that requires a constitutional exception.

a. The four *Tanner* safeguards are insufficient to protect the accused's right to a verdict untainted by racial prejudice.

First, the Colorado Supreme Court itself acknowledged that racial bias "is less readily visible than intoxication, [which] mean[s] . . . the ability of the court to observe the jury's behavior during trial" is unlikely to assist the court or counsel in discovering that bias. Pet. App. 15a.

Second, unlike alcohol consumption, racial bias during deliberations cannot be established using barroom receipts or other forms of physical evidence. *See Tanner*, 483 U.S. at 127 (suggesting that "records of club where jurors dined" could establish juror intoxication during deliberations (describing *United States v. Taliaferro*, 558 F.2d 724, 725-26 (4th Cir. 1977))). Nor can testimony from nonjurors reveal racially biased statements made in the jury room, given the privacy of deliberations and the inability of nonjurors to report what they cannot see. *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Testimony from jurors themselves, therefore, is not only the strongest possible evidence concerning racial bias; it is the *only* evidence likely to be available. *See Rock*, 483 U.S. at 57 (evidence rule unconstitutional as applied because it "virtually prevented" defendant from offering any proof in support of her defense).

Third, jurors are unlikely to come forward with allegations of racial bias before deliberations are complete. Taking such action requires that jurors break ranks in a setting that may already be highly stressful or contentious. *See Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013). Jurors are therefore apt to put off any such reporting until after reaching a verdict, especially because they may not know that Rule 606(b) treats post-verdict reports so differently from pre-verdict reports. *See id.*

Moreover, as one federal judge has observed, jurors may stay silent during deliberations because they rationalize that racism will not impact the verdict and thus conclude that nothing would be gained by speaking out. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 Conn. L. Rev. 1023, 1033 (2008). But after reaching a guilty verdict, the implications of a juror's racial bias may weigh heavy on other jurors' consciences, prompting those jurors to come forward.

Fourth, there are inherent limitations on the capacity of voir dire to prevent racial bias from entering the jury room in the first place. Criminal defendants are not always allowed at voir dire to inquire into racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion). And when defendants *are* permitted to inquire specifically into racial biases, even the Colorado Supreme Court recognized that defense counsel is often well advised not to pose such direct questions. Pet. App. 11a n.5. For one thing, such inquiries "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." *Villar*, 586 F.3d at 87 n.5; *see also* Ted A. Donner & Richard K. Gabriel, Jury Selection Strategy and Science § 34:1 (3d ed. 2014) ("Race and gender bias may be appropriate reasons for excusing prospective jurors, but the subjects should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor."). This places questions about racial prejudice on much different footing from inquiries about less controversial forms of bias – such as the sympathy of the juror in *Warger* for someone who caused a car accident.

Furthermore, asking direct questions about racial bias is usually ineffective anyway. Unlike with other forms of partiality, jurors are unlikely to self-identify as racially prejudiced or to make racially biased statements during voir dire. A juror "may have an interest in concealing his own bias [or he] may be unaware of it." *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring). Either way, "it will rarely be productive to ask jurors directly if they will be prejudiced because of the party's race, as a negative answer will virtually always be forthcoming." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2014).

Defense counsel are therefore typically left at voir dire to pose only general questions about potential bias. But as petitioner's trial demonstrates, such indirect inquiries seldom uncover racial animus. Pet. App. 3a; *see also* Gobert et al., *supra*, § 7:44 ("Whether such general questioning is sufficient for the purpose of exposing racial prejudice is debatable."). Few are prone, in the face of open-ended questions, to volunteer that they harbor socially repugnant views.

b. Even if the *Tanner* factors were generally capable of preventing racial bias from infecting the jury room, racial bias would still stand apart from other forms of partiality. Racial animus is an "especially pernicious" form of prejudice that the Constitution is uniquely concerned with eradicating from the criminal justice system. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *see also McCollum*, 505 U.S. at 58 (decision-making based on "racial animus" intolerably "distort[s] our system of criminal justice"). Accordingly, even a single case of racial bias

influencing a jury's decision to convict "violat[es] the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (quoting *Reid*, 53 U.S. (1 How.) at 366). Faced with reliable evidence of such a blatant constitutional violation, a court is duty-bound to consider the evidence and, if true, provide a remedy.

B. The Right To A Jury Free Of Racial Bias Overrides The Justifications For No-Impeachment Rules.

In addition to discussing the *Tanner* safeguards, the Colorado Supreme Court offered three policy justifications for refusing to hold Rule 606(b) unconstitutional as applied to allegations of racial bias. These rationales do not justify disregarding such egregious violations of defendants' constitutional right to an impartial jury.

1. The Colorado Supreme Court expressed concern that allowing testimony regarding racial bias would cause lawyers to harass jurors. Pet. App. 13a-14a. But prosecutors and defense lawyers already have ample reason to talk to jurors after they have rendered their verdict. Attorneys typically stay after the verdict to ask "what evidence [jurors] found compelling" and gain "valuable information" for future trials. Nancy Hollander & Barbara E. Bergman, Everytrial Criminal Defense Resource Book § 7:1 (2013). Furthermore, most no-impeachment rules allow defendants to challenge verdicts with juror testimony revealing that the jurors relied on "extraneous" information, such as almanacs or home experiments. *See, e.g.*, Fed. R. Evid. 606(b)(2). In light of these realities, courts have developed various means of preventing juror harassment. *See, e.g.*, Colo. R. Prof'l Conduct

3.5(c)(3) (forbidding communications with jurors after discharge of the jury if "the communication involves misrepresentation, coercion, duress or harassment"). There is no reason why those tools would not be equally effective in this context.

Indeed, many jurisdictions already exempt evidence of racial bias from their no-impeachment rules – either on constitutional grounds, *see supra* at 11-15, or as a matter of state law, *see, e.g.*, *State v. Johnson*, 951 A.2d 1257, 1279-80 (Conn. 2008). And no one disputes that the jury system continues to thrive in these jurisdictions. In Connecticut, for example, judges have conducted inquiries into allegations of jurors' racial bias for the past seventeen years, and the courts have developed detailed protocols for eliciting relevant information. *See id.* at 1279; *State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998). Massachusetts courts have been conducting such inquiries for twenty-four years. *See Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010); *Commonwealth v. Laguer*, 571 N.E.2d 371, 375-76 (Mass. 1991). And Minnesota has allowed such inquiries for thirty-five years. *State v. Pederson*, 614 N.W.2d 724, 731 (Minn. 2000); *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *State v. Watkins*, 526 N.W.2d 638, 640-42 (Minn. Ct. App. 1995). Any argument that creating a constitutional exception to Rule 606(b) for racial bias would cause practical problems should have to explain why such problems have not arisen in the real-life experiences of these jurisdictions. Yet neither the Colorado

Supreme Court nor any other court has attempted to do so.[5]

2. The Colorado Supreme Court also maintained that if it held Rule 606(b) unconstitutional as applied to evidence of racial bias, courts would be unable to "discern a dividing line between different *types* of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a. Not so.

a. This Court has shown when enforcing an array of constitutional protections that it is possible to remedy racial bias at trial without triggering slippery slope problems. For instance, although states traditionally have "wide discretion" in compiling grand jury rosters, *see, e.g.*, *Norris v. Alabama*, 294 U.S. 587, 593 (1935), this Court has held that courts must ensure that "members of a racial group [have not been] purposefully . . . excluded." *Rose*, 443 U.S. at 556. Similarly, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all," *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (internal quotation marks omitted), including bias against any group subject only to rational-basis protection, *see J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). But this Court has held that courts must ensure that racial prejudice does not infect the selection of a petit jury. *See Batson*, 476 U.S. at 89. And while voir dire is usually left to the "sound

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[5] This Court has also noted that no-impeachment rules are valuable because they promote "full and frank discussion in the jury room." *Tanner*, 483 U.S. at 120. But there can be no valid interest in creating breathing space for jurors to argue that defendants should be convicted because of their race.

discretion" of trial courts, *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)), this Court has recognized that a trial court must question prospective jurors specifically about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial." *Id.* at 598. There is nothing about jury deliberations that would impede a similarly race-specific approach.

b. Neither would courts be forced to "make arbitrary judgments that hinge on the severity of a particular juror's impropriety," Pet. App. 15a. Courts already regularly hold post-trial hearings to assess "allegations of [other types of] juror partiality" and "to determine the effect of such occurrences when they happen." *See Smith*, 455 U.S. at 215-17. Courts are equally well equipped to determine when racial prejudice actually compromised a juror's impartiality.

For example, when making the comparable assessment whether racial bias motivated an adverse employment decision, "courts must distinguish between . . . 'direct evidence' [of discrimination] and 'stray remarks' in the workplace that do not reflect upon animus." Mark A. Rothstein et al., Employment Law § 2.7, at 289 (5th ed. 2014). While "direct evidence of animus relates to the actor's state of mind at the time of making an adverse decision, a stray remark is simply a prejudicial comment that does not bear upon the challenged employment decision." *Id. Compare, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 183 (3d Cir. 2009) (manager's statement "you ain't nothing but the N word" to African-American independent contractor constituted "direct evidence of discrimination"), *with Perry v.*

Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999) ("isolated, disparaging comments" about Hispanics insufficient to support a racial discrimination claim because there was no "nexus between [the] racist comments and [the employee's] discharge").

Courts are equally capable in the context of impartial jury claims of distinguishing "stray comment[s]" from racist statements "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Márquez, J., dissenting); *see also Villar*, 586 F.3d at 87-88 (emphasizing that trial judges are well situated to identify "stray or isolated off-base statement[s]" when "determin[ing] the probability of prejudice from an inappropriate racial or ethnic comment"); *State v. Brown*, 62 A.3d 1099, 1111 (R.I. 2013) (denying relief because "none of the jurors [in this case] uttered racial slurs, and none explicitly or implicitly suggested that Brown's racial or ethnic background should factor into the jury's decision-making process").

3. Finally, the Colorado Supreme Court suggested that allowing the Sixth Amendment to trump the no-impeachment rule in the context of racial bias "would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a. But acquiescence to racial bias in the jury room is the far greater threat to the legitimacy of our criminal justice system. As this Court has explained, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Thus, there is "[n]o surer way . . . to bring the processes of justice into disrepute" than to

allow courts to turn a blind eye when deliberations have been infected with racial bias. *Aldridge v. United States*, 283 U.S. 308, 315 (1931); *see also* Pet. App. 18a (Márquez, J., dissenting) ("Although the majority believes that this result is required to preserve public confidence in our jury trial system, in my view, it has precisely the opposite effect.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2015 CO 31

Supreme Court Case No. 13SC9
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA34

Petitioner:
Miguel Angel Pena-Rodriguez,
v.
Respondent:
The People of the State of Colorado.

Judgment Affirmed
en banc
May 18, 2015

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CHIEF JUSTICE RICE delivered the Opinion of the Court.

JUSTICE MÁRQUEZ dissents, and **JUSTICE EID** and **JUSTICE HOOD** join in the dissent.

This case involves the interplay between two fundamental tenets of the justice system: protecting the secrecy of jury deliberations and ensuring a defendant's constitutional right to an impartial jury. After entry of a guilty verdict, defense counsel obtained juror affidavits suggesting that one of the jurors exhibited racial bias against the defendant during deliberations. The trial court refused to consider these affidavits, finding that Colorado Rule of Evidence ("CRE") 606(b) barred their admission, and the court of appeals affirmed. *People v. Pena-Rodriguez*, 2012 COA 193, ¶3, __ P.3d __. We granted certiorari to consider whether CRE 606(b) applies to such affidavits and, if so, whether the Sixth Amendment nevertheless requires their admission.[1]

We hold that the affidavits regarding the juror's biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We further hold that the trial court's application of CRE 606(b) did not violate the defendant's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

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[1] Specifically, we granted certiorari to consider: "Whether C.R.E. 606(b) bars the admission of juror statements showing evidence of racial bias made during jury deliberations, and if so, whether the defendant's constitutional right to a fair trial nevertheless requires such statements' admission."

I. Facts and Procedural History

In May 2007, a man made sexual advances toward two teenage girls in the bathroom of the horse-racing facility where Petitioner Miguel Angel Pena-Rodriguez worked. Shortly thereafter, the girls identified Petitioner as the assailant during a one-on-one showup. The People subsequently charged Petitioner with one count of sexual assault on a child – victim less than fifteen; one count of unlawful sexual contact – no consent; and two counts of harassment – strike, shove, or kick. After a preliminary hearing, the court bound over the first count as attempted sexual assault on a child – victim less than fifteen.[2]

At the start of a three-day trial, the jury venire received a written questionnaire, which inquired, "Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?" During voir dire, the judge asked the panel, "Do any of you have a feeling for or against [Petitioner] or the Prosecution?" Later, defense counsel asked the venire whether "this is simply not a good case for them to be a fair juror." None of the jurors subsequently impaneled answered any of these questions so as to reflect racial bias. The jury ultimately found Petitioner guilty of the latter three counts but failed to reach a verdict on the attempted sexual assault charge.

Two weeks later, Petitioner filed a motion for juror contact information, alleging that "some members of the jury used ethnic slurs in the course of

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[2] The People also charged Petitioner with driving under the influence, but they voluntarily dismissed that charge prior to trial.

deliberations." The trial court ordered Petitioner to submit affidavits regarding the "'who, what, when, and where' of the allegations of juror misconduct." Petitioner's counsel subsequently filed an affidavit averring that, shortly after entry of the verdict, two jurors informed her that "some of the other jurors expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic."[3] The trial court then authorized Petitioner's counsel to contact these two jurors, but only to secure affidavits regarding their "best recollection of exactly what each 'biased' juror stated about [Petitioner] and/or the alibi witness."

Thereafter, Petitioner submitted affidavits from jurors M.M. and L.T., both of whom alleged that juror H.C. made racially biased statements during deliberations. According to M.M., H.C. said that "I think he did it because he's Mexican and Mexican men take whatever they want." She also stated that H.C. "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." L.T. stated that H.C. "believed that [Petitioner] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." L.T. further averred that H.C. "said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, L.T. stated that H.C. "said

[3] Petitioner's friend, M. Chavez, testified that Petitioner was with him at the time of the incident and thus could not have been the man in the bathroom.

that he did not think the alibi witness was credible because, among other things, he was 'an illegal.'" Based on these affidavits, Petitioner moved for a new trial. The trial court denied the motion, finding that CRE 606(b) barred any inquiry into H.C.'s alleged bias during deliberations.[4]

Petitioner appealed, and a split division of the court of appeals affirmed. *Pena-Rodriguez*, ¶3. The majority first held that CRE 606(b) controlled the admissibility of the jurors' affidavits and that the affidavits did not satisfy the rule's exceptions. *Id.* at ¶¶ 33, 38, 41-42. The

The majority then rejected Petitioner's constitutional challenge regarding his Sixth Amendment right to an impartial jury, holding that Petitioner "waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire." *Id.* at ¶43. Writing in dissent, Judge Taubman did not disagree with the majority's general analysis of CRE 606(b). *Id.* at ¶107 n.3. He concluded, however, that CRE 606(b) was unconstitutional as applied. *Id.* at ¶ 107. We granted certiorari.

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[4] The trial court did conduct a brief hearing to investigate whether H.C. deliberately misrepresented his experience in law enforcement during voir dire; it found his failure to disclose this information to be inadvertent. This issue is irrelevant to this appeal.

II. Standard of Review

The general applicability of CRE 606(b) is a question of law that we review de novo. *See Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4, 292 P.3d 924. But whether the jury was influenced by extraneous prejudicial information is a mixed question of law and fact; we accept the trial court's findings of fact absent an abuse of discretion, but we review the court's legal conclusions de novo. *Id.*

III. Analysis

This case requires us to resolve whether CRE 606(b) bars admission of juror affidavits suggesting that a juror made racially biased statements during deliberations. To do so, we first examine the plain language of the rule and its overarching purpose. We then conclude that such affidavits indeed implicate CRE 606(b) and do not fall within the rule's "extraneous prejudicial information" exception. Finally, we consider whether the rule was unconstitutional as applied to Petitioner, and we determine that enforcing the rule did not violate his Sixth Amendment right to an impartial jury.

A. CRE 606(b): Language and Purpose

CRE 606(b)is broad in scope: It precludes courts from peering beyond the veil that shrouds jury deliberations. Specifically, the rule provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the

> effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

CRE 606(b). The rule does, however, enumerate three narrow exceptions: "[A] juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." *Id.* Colorado's rule is virtually identical to its federal counterpart. *Compare id. with* Fed. R. Evid. 606(b). *See also* CRE 606(b) committee cmt. ("[CRE] 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule. . . .").

CRE 606(b) effectuates three fundamental purposes: It "promote[s]finality of verdicts, shield[s]verdicts from impeachment, and protect[s] jurors from harassment and coercion." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). Thus, the rule "strongly disfavors any juror testimony impeaching a verdict." *Id.* We have recognized that the federal rule is equally forbidding. *See Stewart ex rel. Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002) ("[Fed. R. Evid. 606(b)] would have been hard to paint with a broader brush, and in terms of subject, [its] exclusionary principle reaches everything which relates to the jury's deliberations, unless one of the exceptions applies." (quoting Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978))).

With the proscriptive language and purpose of CRE 606(b) in mind, we now consider whether the rule operates to bar admission of the juror affidavits in this case.

B. CRE 606(b) Bars Admission of the Jurors' Affidavits

CRE 606(b)'s plain language clearly bars admission of the jurors' affidavits in this case. Absent narrow exceptions, the rule unambiguously prohibits juror testimony "as to any matter or statement occurring during the course of the jury's deliberations." Here, Petitioner seeks to introduce juror testimony precisely to that effect, as the affidavits from both M.M. and L.T. pertain to statements made during deliberations. Therefore, CRE 606(b) precludes their admission.

Petitioner argues that the affidavits do not involve "an inquiry into the validity of [the]verdict" as contemplated by CRE 606(b). In Petitioner's view, the rule only applies to statements regarding the jury's actual deliberative process – that is, *how* the jury reached its verdict – and not to evidence of a particular juror's racial bias. To the extent that we can even parse this semantic distinction, we deem it immaterial. Petitioner seeks to introduce evidence of comments made during deliberations in order to nullify the verdict and obtain a new trial. Such a request necessarily involves an inquiry into the verdict's validity, which is the very inquiry that CRE 606(b) prevents.

Indeed, the U.S. Supreme Court expressly rejected this exact argument in *Warger v. Shauers*, 135 S. Ct. 521, 528 (2014), determining that the rule "does not

focus on the means by which deliberations evidence might be used to invalidate a verdict." Rather, the Court held that the rule "simply applies '[d]uring an inquiry into the validity of the verdict' – that is, during a *proceeding* in which the verdict may be rendered invalid." *Id.* (alteration in original). Although the Court was interpreting Fed. R. Evid. 606(b), we have previously recognized that CRE 606(b) is "[s]ubstantially similar to its federal counterpart" and that we "look to the federal authority for guidance in construing our rule." *Stewart*, 47 P.3d at 321. Thus, *Warger* forecloses Petitioner's argument.

Petitioner next contends that, even if CRE 606(b)applies, the affidavits satisfy the rule's exception for "extraneous prejudicial information." He is mistaken. That exception pertains to "legal content and specific factual information learned from outside the record and relevant to the issues in a case." *Kendrick*, 252 P.3d at 1064; *see, e.g.*, *Harlan*, 109 P.3d at 629 (holding that two jurors' introductions of annotated Bibles into deliberations during a death penalty case constituted extraneous information because "[t]he trial court had not admitted these materials into evidence, nor did the court's instructions allow their use"). But it is "generally undisputed" that jurors "may apply their general knowledge and everyday experience when deciding cases." Kendrick, 252 P.3d at 1064; *accord Warger*, 135 S. Ct. at 529 ("Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that

jurors are understood to bring with them to the jury room."). Here, H.C. did not perform any improper investigation into Petitioner's case, nor did he introduce evidence from outside the record into the jury room. Rather, his alleged racial bias arose from his personal beliefs and everyday experience. Such bias, however ideologically loathsome, is not "extraneous" as contemplated by CRE 606(b).

And once again, *Warger* scuttles Petitioner's claim. In that car-crash case, following a verdict for the defendant, a juror reported that another juror stated during deliberations that her daughter had once caused a motor vehicle accident and that "if her daughter had been sued, it would have ruined her life." 135 S. Ct. at 524. The Court held that such information "falls on the 'internal' side of the line: [The juror's] daughter's accident may well have informed her general views about negligence liability for car crashes, but it did not provide either her or the rest of the jury with any specific knowledge regarding [the] collision." *Id.* at 529. The Court noted that even if the juror's comments would have warranted a challenge for cause, that did not render them "extraneous," as otherwise "[t]he 'extraneous' information exception would swallow much of the rest of Rule 606(b)." *Id.* at 530. The same analysis applies here.

Accordingly, we hold that the affidavits concerning H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We

now address whether CRE 606(b)was unconstitutional as applied in this case.[5]

C. CRE 606(b) Was Not Unconstitutional as Applied

The Sixth Amendment to the U.S. Constitution provides that "the accused shall enjoy the right to . . . an impartial jury." The question here is whether the trial court's application of CRE 606(b), which functioned to bar evidence of H.C.'s alleged racial bias against Petitioner, violated his Sixth Amendment right.

The U.S. Supreme Court addressed a similar – though not identical – issue in *Tanner v. United States*, 483 U.S. 107 (1987). In that case, following the verdict, a juror contacted defense counsel and informed him that several jurors had consumed alcohol on lunch breaks during the trial and had slept

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[5] The court of appeals refused to conduct this analysis, holding that Petitioner "waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire." *Pena-Rodriguez*, ¶43. But a defense attorney's decision not to ask about racial bias – and to instead attempt to root out prejudice through generalized questioning – is entirely defensible as a matter of strategy. *See United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009) ("[M]any defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight."). Here, Petitioner's counsel asked potential jurors not whether they took issue with Petitioner's race but simply if they could be fair. We cannot conclude that this tactical decision to avoid explicitly inquiring about racial bias – which would have underscored Petitioner's minority background – constituted an affirmative waiver of Petitioner's constitutional right to an impartial jury.

through afternoons, while another juror told counsel that the jury was "one big party" and that numerous jurors used alcohol and drugs. *Id.* at 113, 115-16. After holding that Fed. R. Evid. 606(b) barred this testimony, *see id.* at 125, the Court considered whether the Sixth Amendment nevertheless required the trial court to examine such evidence. The Court first declared that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.* at 127. Turning to the opposing scale, the Court reasoned that "several aspects of the trial process" protect a defendant's Sixth Amendment right to an impartial jury. *Id.* The Court identified four specific safeguards: (1) voir dire; (2) the court and counsel's ability to observe the jury during trial; (3) jurors' opportunity to "report inappropriate juror behavior to the court before they render a verdict"; and (4) the opportunity to use non-juror evidence of misconduct to impeach the verdict following trial. *Id.* The Court thus concluded that Rule 606(b) need not yield to Sixth Amendment considerations. *See id.*

Tanner, then, held that Rule 606(b) was not unconstitutional as applied to cases of juror incompetence. Last year, the Court in *Warger* extended *Tanner* to cases of juror bias. Relying on *Tanner*, the Court recognized that "[e]ven if jurors lie in voir dire in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Warger*, 135 S. Ct. at 529. Therefore, the Court held

that *Tanner* foreclosed "any claim that Rule 606(b) is unconstitutional in circumstances such as these." *Id.*

Combined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system. *See Tanner*, 483 U.S. at 119 ("Substantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict."); *Warger*, 135 S. Ct. at 528 ("Rule 606(b) was premised on the concerns that the use of deliberations evidence to challenge verdicts would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions."). It was this principle that animated the Court's refusals to deem Rule 606(b) unconstitutional, despite concerns regarding juror impropriety. Indeed, although the *Tanner* Court acknowledged that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," it warned that "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." 483 U.S. at 120. As the Court recognized, not only would authorizing post-verdict investigations of jurors "seriously disrupt the finality of the process," but the very potential for such investigations would shatter public confidence in the fundamental notion of trial by jury. *Id.* ("[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."); *see also United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) ("If what went on in

the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands."). In fact, the Court perceived such a slippery slope as far back as 100 years ago:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

Turning to the instant case, this case law compels the conclusion that CRE 606(b) was not unconstitutional as applied to Petitioner. A contrary holding would ignore both the policy underlying CRE 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy. To be sure, neither *Tanner* nor *Warger* involved the exact issue of racial bias. But in examining the Court's jurisprudence, we cannot discern a dividing line between different *types* of juror bias or misconduct,

whereby one form of partiality would implicate a party's Sixth Amendment right while another would not. *Cf. Benally*, 546 F.3d at 1241 ("[O]nce it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations."). To draw such a line would not only violate the longstanding rule of shielding private jury deliberations from public view – not to mention incentivize post-verdict harassment of jurors – but it would also require trial courts to make arbitrary judgments that hinge on the severity of a particular juror's impropriety or the intensity of his bias. We decline to sanction such a haphazard process.

Admittedly, bias is less readily visible than intoxication, meaning the second *Tanner* protection – the ability of the court to observe the jury's behavior during trial – carries less force in such cases. But that did not prevent the *Warger* Court from deeming the remaining *Tanner* safeguards sufficient to protect a party's constitutional rights, even when a biased juror lied during voir dire. See *Warger*, 135 S. Ct. at 529; *see also Benally*, 546 F.3d at 1240 ("The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases. . . ." (emphasis added)). The same is true here. Other jurors could have informed the court or counsel of H.C.'s statements prior to delivering the verdict, and any non-juror evidence of his bias remained admissible post-verdict. That these safeguards did not benefit Petitioner in this case does not nullify their validity, nor *Warger*'s clear endorsement of their ability to

protect a party's constitutional right to an impartial jury.[6]

Accordingly, we conclude that the trial court's application of CRE 606(b) to bar admission of the jurors' affidavits did not violate Petitioner's Sixth Amendment right.

IV. Conclusion

CRE 606(b) operates to ensure that the privacy of jury deliberations remains sacrosanct. The rule, and the policy it buttresses, is squarely on point in this case. We thus hold that the jurors' affidavits regarding H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We further hold that the trial court's application of CRE 606(b) did not violate Petitioner's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE MÁRQUEZ dissents, and JUSTICE EID and JUSTICE HOOD join in the dissent.

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[6] We recognize that the *Warger* Court commented, in a footnote, that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. at 529 n.3. But the Court declined to consider in that case "whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* Absent a clear command from the Supreme Court, we will not defy the unmistakable trend in the Court's case law – as articulated in both *Tanner* and *Warger* – preserving the sanctity of jury deliberations and thus refusing to deem Rule 606(b) unconstitutional.

JUSTICE MÁRQUEZ, dissenting:

I agree with the majority that CRE 606(b) bars admission of the post-verdict affidavits in this case. By its terms, that rule of evidence precludes any "inquiry into the validity of a verdict" based on juror testimony regarding statements made during jury deliberations, and Pena-Rodriguez's motion for a new trial "plainly entail[ed] an inquiry into the validity of the verdict," even if it questioned the jury's impartiality and not its thought processes. *Warger v. Shauers*, 135 S. Ct. 521, 525 (2014) (internal quotation marks omitted). I also agree that evidence of a juror's personal bias does not qualify as "extraneous prejudicial information" for purposes of the exception in CRE 606(b)(1). *See id.*at 529; *United States v. Benally*, 546 F.3d 1230, 1237–38 (10th Cir. 2008); *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011). Nevertheless, I respectfully dissent because, in my view, Rule 606(b) "cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Racial bias is detestable in any context, but in our criminal justice system it is especially pernicious. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979). I would hold that where, as here, evidence comes to light that a juror specifically relied on racial bias to find the defendant guilty, CRE 606(b) must yield to the defendant's constitutional right to an impartial jury.[1]

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[1] I note that the question before us is not whether there is sufficient evidence to impeach the jury's verdict. Rather, the question is simply whether the trial court has discretion to

By foreclosing consideration of the evidence of racial bias alleged in this case, the majority elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial. Although the majority believes that this result is required to preserve public confidence in our jury trial system, in my view, it has precisely the opposite effect.

"The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986). Our state constitution likewise guarantees this right. *See* Colo. Const. art. II, §§ 16, 25. Indeed, this court has observed that "[a]n impartial jury is a fundamental element of the constitutional right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000) (citing *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994)). Racial discrimination in our jury trial system "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940) (footnote omitted). Importantly, the harm caused by such discrimination is "'not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes

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consider the allegations made in the post-verdict affidavits and to explore the validity of those allegations in an evidentiary hearing as part of a motion for a new trial.

of our courts.'" *Rose*, 443 U.S. at 556 (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

In its recent discussion of Fed. R. Evid. 606(b) in *Warger*, the United States Supreme Court observed that certain features built into the jury system ordinarily suffice to expose juror bias before the jury renders a verdict. *Warger*, 135 S. Ct. at 529 (citing Tanner v. United States, 483 U.S. 107, 127 (1987)).[2] *Warger* involved a negligence action arising out of a motor vehicle accident. *See id.*at 524. In that case, a juror allegedly stated during deliberations that her daughter had been at fault in a motor vehicle collision in which a man died and that if her daughter had been sued, it would have ruined her life. *Id.* Warger argued in a motion for a new trial that this statement revealed that the juror had lied during voir dire about her impartiality and her ability to award damages. *Id.* The Court concluded that Fed. R. Evid. 606(b) barred consideration of this evidence. *Id.* at 525. It also concluded that its decision in *Tanner* foreclosed Warger's claim that Rule 606(b) was unconstitutional as applied to the circumstances of that case. *Id.* at 529. In so doing, however, the Court expressly acknowledged that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," and declined to consider whether "the usual safeguards are or are not sufficient to protect the integrity of the [jury] process" under

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[2] These protections include: (1) voir dire; (2) observations of the jury by the court, counsel, and court personnel during trial; (3) pre-verdict reports by jurors of inappropriate behavior; and (4) post-verdict evidence other than juror testimony. *Tanner*, 483 U.S. at 127.

such circumstances. *Id.* at 529 n.3. In my view, this is that exceptional case.

According to the two juror affidavits obtained by Pena-Rodriguez's counsel, Juror H.C. made several statements during jury deliberations indicating that he relied on racial bias to determine Pena-Rodriguez's guilt:

- Pena-Rodriguez "did it because he's Mexican and Mexican men take whatever they want."
- Mexican men are physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.
- Pena-Rodriguez "was guilty because, in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."
- Where Juror H.C. used to patrol, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."
- Pena-Rodriguez's alibi witness was not credible because, among other things, he was "an illegal."

In my view, the circumstances of this case reveal that the safeguards identified in *Tanner* are not always adequate to protect a criminal defendant's constitutional right to an impartial jury. Unlike the comment in *Warger*, Juror H.C.'s multiple statements in this case evince racial bias toward a criminal defendant. And, importantly, these alleged statements

reveal Juror H.C.'s inability to decide impartially the crucial issue in this case: whether Pena-Rodriguez committed the charged crimes, or whether he instead had a credible alibi.

The majority claims to adhere to "the unmistakable trend" in United States Supreme Court case law "refusing to deem Rule 606(b) unconstitutional." Maj. op. ¶ 24 n.6. Yet the Supreme Court has expressly acknowledged the possibility that juror bias may be so "extreme" as to call into question the adequacy of the usual safeguards to protect the integrity of the process. *Warger*, 135 S. Ct. at 529 n.3. In my view, where, as here, it appears that a juror specifically relied on racial bias to find the defendant guilty, Rule 606(b) must yield to a defendant's constitutional right to an impartial jury, in that a trial court must be afforded the discretion to explore the validity of such allegations in the context of a motion for a new trial.

The question whether evidence of a juror's racial bias should be admissible in some cases, notwithstanding Rule 606(b), is hardly uncharted territory. In *Villar*, the United States Court of Appeals for the First Circuit considered whether the usual *Tanner* safeguards suffice to protect a defendant's right to an impartial jury where racial or ethnic bias is alleged, as opposed to the type of juror misconduct at issue in *Tanner*. 586 F.3d at 85-87. In *Villar*, a juror emailed defense counsel following the verdict to report that another juror said, "I guess we're profiling, but [Hispanics] cause all the trouble." *Id.* at 81 (internal quotation marks omitted). Similarly, in *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013), a

juror wrote to the judge post-verdict alleging that some jurors felt that "all 'blacks' are guilty." Like the present case, both *Villar* and *Kittle* involved racially motivated statements directly tied to the defendant's guilt.

In *Villar*, the First Circuit concluded that "the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations." 586 F.3d at 87; *see also Kittle*, 65 A.3d at 1154 ("[T]he protections built into the trial process identified by *Tanner* do not adequately protect a defendant's constitutional right to a trial and jury free from racial or ethnic bias."). Although the *Tanner* safeguards serve to protect a defendant's Sixth Amendment right to a jury trial, they focus on juror *misconduct*. *See* 483 U.S. at 127.[3] In my view, they are not always adequate to uncover racial bias before the jury renders its verdict.

First, as the majority acknowledges, defense attorneys may, for legitimate tactical reasons, choose not to question jurors about racial bias during voir dire and instead attempt to root out prejudice through more generalized questioning. Maj. op. ¶ 18 n.5; *see also Villar*, 586 F.3d at 87 n.5; *Kittle*, 65 A.3d at 1155. And even when defense attorneys are willing to probe this sensitive topic directly, jurors may be reluctant to admit racial bias during voir dire. *Villar*, 586 F.3d at

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[3] In *Tanner*, a juror alleged in an interview following the trial that he "felt like . . . the jury was on one big party"; that multiple jurors consumed large quantities of alcohol during recesses, smoked marijuana, and ingested cocaine; and that some jurors fell asleep or were high during trial. 483 U.S. at 115-16.

87. Second, jurors might not report racial comments made during deliberations before the verdict because they are unwilling to confront their fellow jurors, or because they believe they cannot report such comments before rendering a verdict, or because they are unaware that post-verdict testimony is putatively inadmissible. *Kittle*, 65 A.3d at 1155; *see also People v. Pena-Rodriguez*, 2012 COA 193, ¶ 120, __ P.3d __ (Taubman, J., dissenting) (noting that the trial court instructed the jury that it would not be able to communicate with anyone during deliberations). *Contra* maj. op. ¶ 24. Third, observations of the jury by counsel and the court during trial are generally unlikely to uncover racial bias. *Villar*, 586 F.3d at 87; *see* maj. op. ¶ 24. And fourth, non-jurors cannot report racially biased statements made during deliberations to which they obviously do not have access. *Villar*, 586 F.3d at 87. *Contra* maj. op. ¶24. For all these reasons, the *Tanner* protections do not always provide adequate safeguards of a defendant's right to an impartial jury.[4]

In my view, the trial court should have discretion in some circumstances to admit evidence of racially biased statements made during juror deliberations. As the *Villar* court noted, the trial judge will often be in the best position to determine whether an inquiry is necessary to vindicate a defendant's Sixth Amendment

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[4] In *Kittle*, the court noted a split among federal courts of appeals on the question whether evidence of racial or ethnic bias should be admissible and concluded that *Villar* was more persuasive than conflicting decisions. *See* 65 A.3d at 1153-54 & n.9 (comparing *Villar*, 586 F.3d at 85-87, *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), and *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987), *with Benally*, 546 F.3d at 1237, and *Williams v. Price*, 343 F.3d 223, 225-35 (3d Cir. 2003)).

right to an impartial jury. *See* 586 F.3d at 88; *see also Kittle*, 65 A.3d at 1155-56. Thus, the *Villar* court remanded that case to the trial court to decide whether the juror's report warranted further inquiry. 586 F.3d at 89.[5]

Should the trial court conclude that further inquiry is appropriate, it must then determine whether a juror was actually biased. If such a juror sat on the case, the defendant is entitled to a new trial without having to establish that the juror's bias affected the verdict. See *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010) ("Because actual juror bias affects the essential fairness of the trial, a defendant who has established a juror's actual bias is entitled to a new trial without needing to show that the juror's bias affected the jury's verdict."); *cf. People v. Dunoyair*, 660 P.2d 890, 895-96 (Colo. 1983) (implying that a defendant is presumptively prejudiced and entitled to a new trial if he or she establishes that a juror was actually biased). Only if the defendant fails to establish that a juror was actually biased must he show that the "statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right to have his guilt decided by an impartial jury on the evidence admitted at trial." *McCowen*, 939 N.E.2d at 765. Therefore, contrary to the People's argument, Pena-Rodriguez

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[5] On remand, the trial court ultimately determined that the jury's verdict should stand, and that decision was upheld on appeal. *See United States v. Villar*, 411 F.App'x 342, 342 (1st Cir. 2011) (per curiam), *cert. denied*, 131 S. Ct. 2167 (2011).

may be entitled to a new trial regardless of the effect of Juror H.C.'s comments on the verdict.

The majority admits that *Tanner* did not implicate "the exact issue of racial bias" but summarily concludes: "[W]e cannot discern a dividing line between different types of juror bias or misconduct." Maj. op. ¶ 23. I disagree. I would limit our holding in this case to post-verdict evidence of racial or ethnic bias that goes directly to the issue of the defendant's guilt. Racial bias differs from other forms of bias in that it compromises institutional legitimacy. *See* Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 44-45, 47 (2015). A holding limited to such circumstances would reflect and respond to a real-world threat to the integrity of the jury trial right. *See Warger*, 135 S. Ct. at 529 n.3.

Furthermore, the majority overstates its concerns about the potential demise of the jury system should the allegations in this case be admissible in a motion for a new trial. The majority reasons that "the secrecy of jury deliberations is of paramount importance in our justice system," maj. op. ¶ 22, yet fails to acknowledge that jurors are free to discuss deliberations publicly. *See* Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. Rev. 262, 294-95 (2012). Concerns about "post-verdict harassment of jurors," maj. op. ¶ 23, are similarly misplaced: Even commentators critical of allowing post-verdict evidence of juror bias have observed that the exception in Rule 606(b)(1) for extraneous information already creates

an incentive for the losing party to contact jurors after a verdict has been rendered. *See* Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 Syracuse L. Rev. 1, 9-10 (2010). The majority's broader fear that the jury system may not survive absent unbending application of Rule 606(b), maj. op. ¶ 22,[6] has proven groundless; the jury system has not collapsed in jurisdictions where trial courts have discretion, in rare circumstances, to allow post-verdict evidence of racial bias. *Cf. Pena-Rodriguez*, ¶ 123 (Taubman, J., dissenting) (observing that post-verdict evidence of racial bias has rarely surfaced in Colorado; thus, any exception to CRE 606(b) would be invoked only infrequently).

The policies of finality and juror privacy that underlie CRE 606(b) are well founded. Moreover, not every stray comment reflecting a racial stereotype warrants a hearing. However, this case presents the extreme exception contemplated in *Warger*. The multiple comments alleged to have been made in this case were heard by other jurors and were directly tied to the determination of the defendant's guilt. According to the two post-verdict affidavits, Juror H.C. expressed in various ways that Pena-Rodriguez "did it

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[6] The majority quotes *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915), for the proposition that permitting post-verdict evidence of impropriety during deliberations would undermine the jury system. Maj. op. ¶ 22. Yet the Supreme Court recognized in that case that "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (internal quotation marks omitted).

because he's Mexican." I simply cannot agree with the majority that "[p]rotecting the secrecy of jury deliberations" is of such "paramount importance in our justice system," maj. op. ¶ 22, that it must trump a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias. In my view, to foreclose consideration of the allegations presented here is precisely what "shatter[s] public confidence in the fundamental notion of trial by jury." *Id.* Accordingly, I respectfully dissent.

I am authorized to state that JUSTICE EID and JUSTICE HOOD join in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS

2012 COA 193

Court of Appeals No. 11CA0034
Arapahoe County District Court No. 07CR2311
Honorable John L. Wheeler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Miguel Angel Pena-Rodriguez,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division I

Opinion by JUDGE WEBB

Loeb, J., concurs

Taubman, J., dissents

Announced November 8, 2012

John W. Suthers, Attorney General, Majid Yazdi, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Law Office of Jonathan D. Rosen, PC, Jonathan D. Rosen, Denver, Colorado, for Defendant-Appellant

Secrecy of jury deliberations and juries free of bias are both core values of our jury system. But where a defendant seeks to prove that a juror exhibited racial bias during deliberations, these values conflict. Resolving this conflict is a matter of first impression in Colorado.

A jury convicted defendant, Miguel Angel Pena-Rodriguez, of unlawful sexual contact and harassment. He now challenges the judgment of conviction, contending the trial court committed multiple errors involving the jury. Defendant's primary contention concerns one juror's alleged failure to disclose racial bias, constituting juror misconduct.

We conclude that CRE 606(b) renders juror affidavits describing statements of racial bias made during deliberations inadmissible, and we decline to hold CRE 606(b) unconstitutional as so applied because defendant failed to conduct specific voir dire on racial bias. Rejecting defendant's other contentions, we affirm.

I. Background

Defendant was charged with attempted sexual assault on a child, unlawful sexual contact, and harassment based on his contact with two teenage girls. During voir dire, the trial court and counsel questioned the venire on several topics, including, as relevant here, whether any of the potential jurors:

- Had "any feeling for or against" either party;
- "Are in law enforcement or had family or close friends in law enforcement;

- Could not "render a verdict solely on the evidence presented at trial and the law," without regard to "any other ideas, notions, or beliefs about the law'"
- Had taken "law classes of any kind";
- Thought this would not be a "good case" for them to serve as "a fair juror";
- Wanted to discuss "anything else" privately with the court.

Defendant's assertion of misconduct involves H.C., whose only response to these questions was that he had taken classes in real estate and contract law. He agreed to put aside this knowledge when rendering his verdict and was sworn in as Juror 11.

The prosecution relied on pretrial and in-court identification of defendant by the victims, but presented no physical evidence. Defendant's sole witness testified to having been with defendant at a different location when the charged offenses occurred. The jury convicted defendant of unlawful sexual contact and harassment but could not reach a verdict on the sexual assault charge.

After the jury returned its verdict and was dismissed, two jurors told defense counsel that a juror – later identified as Juror 11 – had made racially biased statements during deliberations. Defendant moved for access to all of the jurors' contact information. Despite receiving affidavits from defense counsel stating the "who, what, when, and where" of the allegation, as the trial court had requested, the

court refused to grant "carte blanche" access to jurors. Instead, it ordered:

- Defendant would specify the gender of the jurors who made the allegations;
- The trial court would then permit defense counsel to contact jurors of that gender, provided that the contact was limited to identifying the two jurors who made the allegations;
- Defense counsel could then secure affidavits from the two jurors addressing only what statements the allegedly biased juror had made concerning his bias.

Without objection, defendant complied with this procedure, which resulted in two juror affidavits.

The first affidavit quoted Juror 11 as having said that he thought defendant "did it because he's Mexican and Mexican men take whatever they want." This affidavit referenced unspecified "other statements" made by Juror 11 about "Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women."

Similarly, the second affidavit indicated that Juror 11 had said that he "believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The affidavit also averred that Juror 11 had said that "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." According

to this affidavit, Juror 11 also said that he "did not think the alibi witness was credible because, among other things, he was 'an illegal.'"

The trial court agreed to hold an evidentiary hearing on whether Juror 11 had misrepresented information during voir dire. However, because the court determined that Juror 11 had not been asked about racial bias during voir dire, the hearing would be limited to Juror 11's law enforcement experience and why he had not responded when asked about such experience. Defendant objected that the scope of the hearing was too narrow, arguing that Juror 11 was asked about racial bias. The court overruled both objections.

During the evidentiary hearing, Juror 11 testified that a distant relative was a law enforcement officer and that he had friends in law enforcement. Juror 11 only had a vague recollection of being asked about his law enforcement background, and said that any question did not "pointedly ask[]" about past employment. He said that he did not intentionally misrepresent his past employment, but thought that his law enforcement experience "forty years ago" was irrelevant.

The trial court found that while Juror 11 had misrepresented his law enforcement background during voir dire, the misrepresentation was inadvertent. Defendant does not appeal this ruling. Finding that Juror 11's law enforcement experience was too remote to show actual bias against defendant, the trial court refused to grant a new trial.

II. Denial of Motion for New Trial

The record refutes defendant's contention that the trial court abused its discretion in finding that Juror 11 was not specifically asked about racial bias in voir dire. Thus, we conclude that the court properly limited the evidentiary hearing to Juror 11's law enforcement connections. Defendant has not appealed the trial court's finding that Juror 11 made no deliberate misrepresentations about those connections. And, because the record also supports the trial court's finding that Juror 11's law enforcement connections did not create actual bias, we further conclude that the court properly denied defendant's motion for new trial.

A. Standard of Review

Post-trial rulings involving alleged juror misconduct are reviewed for an abuse of discretion. *People v. Mollaun*, 194 P.3d 411, 416 (Colo. App. 2008). To abuse its discretion, a court's decision must be "manifestly arbitrary, unreasonable, or unfair, or based on an erroneous view of the law." *Id.* A court has not abused its discretion if the record provides some support for its action. *Cf. People v. Harlan*, 8 P.3d 448, 464 (Colo. 2000) (finding that, despite voir dire irregularities, because the record provided support for the trial court's rulings, the trial court did not abuse its discretion), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

B. Law

The United States and Colorado Constitutions guarantee criminal defendants a right to trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Dunlap v. People*, 173 P.3d

1054, 1081 (Colo. 2007). While voir dire is not a constitutional right, *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006), Colorado court rules allow defendants to examine potential jurors for partiality. *See* Crim. P. 24(a). If a juror is asked a material question during voir dire and fails to answer that question truthfully, the court may grant a new trial. *People v. Borrelli*, 624 P.2d 900, 903 (Colo. App. 1980); *see People v. Rael*, 40 Colo. App. 374, 375-76, 578 P.2d 1067, 1068 (1978). However, to obtain a new trial based on juror misrepresentation, counsel must have asked specific questions about the subject of the misrepresentation during voir dire. *See Seventh Day Adventist Ass'n of Colorado v. Underwood*, 99 Colo. 139, 141-42, 60 P.2d 929, 930 (1936) (refusing to address in a motion for new trial the assertion that potentially biased jurors prevented a fair trial, as no "specific questions" were asked about this bias in voir dire).

Further, not all juror misrepresentations merit a new trial. *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 292 (Colo. App. 1989). If the misrepresentation was inadvertent, a defendant must show the juror's "actual bias" to obtain a new trial. *People v. Dunoyair*, 660 P.2d 890, 896 (Colo. 1983).

Actual bias requires more than an abstract belief in a defendant's guilt. *Beeman v. People*, 193 Colo. 337, 340, 565 P.2d 1340, 1342 (1977). Rather, the circumstances must show a "personal and emotional" connection between the juror and the defendant. *Id.* For example, in *Beeman v. People*, 193 Colo. at 339, 565 P.2d at 1341, a defendant in a rape case had previously frightened a juror's pregnant daughter. The

juror was so upset that she asked the defendant's employer to reprimand him. *Id.* Additionally, the weapon allegedly used in the rape was missing from the daughter's home. *Id.* at 339, 565 P.2d at 1341-42. Given all of these close connections, the court awarded a new trial. *Id.* at 338-39, 565 P.2d at 1341. Other examples of the close ties required to find actual bias include:

- A juror's husband, son, and father-in-law being police officers and the juror stating she would "end up" being biased. *People v. Prator*, 833 P.2d 819, 821 (Colo. App. 1992), *aff'd*, 856 P.2d 837 (Colo. 1993);
- A juror having a "close association with not only the law enforcement establishment, but also with this crime scene, and with the co-employee who had attended to this murder victim." *People v. Rogers*, 690 P.2d 886, 888 (Colo. App. 1984);
- A juror's husband being a police officer, the prosecution witness being "familiar" with her, and the prosecutor having been the juror's former teacher. *People v. Reddick*, 44 Colo. App. 278, 280, 610 P.2d 1359, 1360 (1980).

In contrast, juror ties such as the following were insufficient:

- A juror recognizing the victim as her daughter's acquaintance. *People v. Drake*, 841 P.2d 364, 367 (Colo. App. 1992);
- A juror realizing a witness testifying to "tangential" facts was a former acquaintance. *Dunoyair*, 660 P.2d at 895-96.

C. Application

1. Limiting the Hearing to Law Enforcement Connections

After reviewing the voir dire record,[1] the trial court ruled that Juror 11 had not been asked whether he harbored racial bias. The court recognized that Juror 11 was asked about feelings "for or against" defendant and whether this would be a good case to serve as a "fair juror." However, it concluded that these questions were not specific enough to find that Juror 11 had misrepresented information about his possible bias in voir dire. Observing that parties "almost always" pose specific questions about ethnicity during voir dire, the court noted that defense counsel's declining to do so may have been intentional.

The record contains some support for these conclusions. For example, before voir dire, the trial court told defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. I don't know if that's an issue for you or your client, but you may want to address it." Yet, during the extensive voir dire, defense counsel did not mention race, national origin, or immigration status. And unlike the questions about law enforcement, which several jurors answered broadly, no venire member responded when asked about having feelings "for or against the defendant."

Thus, we decline to disturb the finding that because Juror 11 was not asked about racial bias in

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[1] The judge who conducted defendant's trial and subsequent proceedings was different from the judge who conducted voir dire.

voir dire, defendant could not explore this subject at the hearing. Here, the trial court found that there "were no questions asked about the defendant's ethnicity" during voir dire. Based on this finding, the court impliedly concluded that Juror 11 could not have been expected to respond about any potential racial bias, the subject that defendant sought to explore in the hearing. This is a factual determination, distinct from our conclusion below that defendant waived his as-applied constitutional challenge to CRE 606(b), an issue we resolve de novo.

Although some of the questions asked might have elicited a response concerning racial bias, our review is limited to whether the record presents any basis for the trial court's decision. *See Harlan*, 8 P.3d at 462 ("In a noncapital case, we will overturn the trial court's resolution of a challenge for cause only if the record presents no basis for supporting it."). Here, the record presents such a basis. Therefore, the trial court did not abuse its discretion in limiting the evidentiary hearing to Juror 11's law enforcement connections.

2. "Actual Bias" Not Caused by Law Enforcement Connections

Defendant accepts the finding that Juror 11's misrepresentation of his law enforcement background was inadvertent, but contends that the trial court abused its discretion in finding no actual bias. However, defendant does not explain, nor does the record suggest, any such actual bias arising from Juror 11's limited law enforcement experience.

Juror 11's previous employment as an officer and general acquaintances with officers do not involve a personal relationship with any party or witness.

Further, his employment in law enforcement ended more than four decades before trial, making it highly improbable that such service would have overlapped with any party working on the case. Juror 11's relationships with present law enforcement personnel do not suggest bias because they are limited to some friends and a distant relative, none of whom has any connection to the case.

In addition, law enforcement witnesses played a relatively minor role in the case. *See Dunoyair*, 660 P.2d at 896 ("Such a presumption [of actual bias] would be particularly inappropriate where, as here, the witness's testimony relates to facts which are tangential to the alleged criminal act ."). At trial, the victims testified to the assault and their identification of defendant near the crime scene. They also identified defendant in the courtroom. Two close family members of the victims also testified to events immediately before and after the assault. Beyond describing the victims' crime scene identifications and investigation of other trial witnesses, the main role of the law enforcement witnesses was to describe having arrested defendant in the area shortly after the assaults were reported. They also defended having failed to gather fingerprint evidence at the scene.

Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.

III. Admissibility of Juror Affidavits Under CRE 606(b)

Defendant next contends that because the statements of bias attributed to Juror 11 in the juror affidavits showed deliberations were corrupted by

extraneous prejudicial information or an outside influence, he is entitled to a new trial. We reject this contention because we conclude that the statements do not fall within the exceptions to CRE 606(b), and thus the record contains no admissible evidence of Juror 11's bias.

A. Standard of Review

Interpretation of court rules is an application of law, requiring de novo review. *Gleason v. Judicial Watch, Inc.*, 2012 COA 76, ¶ 14. However, whether the jury was affected by extraneous influences or outside information is a mixed question of law and fact. *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011). We review legal conclusions de novo, while reviewing factual determinations for an abuse of discretion. *Id.*

B. Law

CRE 606(b)[2] broadly prevents attacks on verdicts using information from jury deliberations. Challenges to the "validity of a verdict" may not rely on:

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[2] "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." CRE 606(b).

- Any issue or statement made during deliberations;
- The effect anything has on a juror's deliberations; or
- Any mental processes related to the jury's verdict.

This limitation protects the finality of verdicts and allows jurors to deliberate without fear of reprisal, coercion, or criticism. *See Stewart v. Rice*, 47 P.3d 316, 322 (Colo. 2002); *People v. Kriho*, 996 P.2d 158, 167 (Colo. App. 1999).

CRE 606(b) contains three exceptions. As relevant here, juror testimony is admissible to show that "extraneous prejudicial information" was brought to the jury's attention and that "outside influence" was brought to bear on a juror.

A defendant is entitled to a new trial if a reasonable possibility exists that the jury verdict was tainted by extraneous prejudicial information or outside influences. *Harper v. People*, 817 P.2d 77, 82 (Colo. 1991). However, evidence proving this prejudice is only admissible if it complies with CRE 606(b). *Ravin v. Gambrell*, 788 P.2d 817, 820 (Colo. 1990); *Wiser v. People*, 732 P.2d 1139, 1141 (Colo. 1987).

C. Application

1. "Validity of the Verdict"

Defendant first contends CRE 606(b) does not apply to statements made during deliberations when offered to show racial bias because the inquiry is not into the deliberative process. However, CRE 606(b) applies to evidence of statements made during

deliberations offered to attack "the validity of a verdict." Here, by seeking a new trial based on juror misconduct, defendant is attacking the validity of the verdict.

CRE 606(b) applies broadly, *Mollaun*, 194 P.3d at 416, reaching "everything which relates to the jury's deliberations, unless one of the exceptions applies." *Stewart*, 47 P.3d at 321 (quoting Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978)). It bars all "juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds." *Stewart*, 47 P.3d at 322.

Defendant cites no Colorado case holding that parties may attack verdicts using statements made during deliberations, provided that no analysis of the deliberative process is necessary. Under CRE 606(b), three distinct categories of testimony are inadmissible during "an inquiry into the validity of a verdict," one of which is juror testimony regarding "*any matter or statement* occurring during the course of the jury's deliberations" (emphasis added). Because no other language in CRE 606(b) limits this broad prohibition, we do not deviate from the text of the rule. *See Black v. Waterman*, 83 P.3d 1130, 1136-38 (Colo. App. 2003) (applying CRE 606(b) to evidence supporting a motion for new trial).

Therefore, we conclude that CRE 606(b) controls the admissibility of these affidavits.

2. "Extraneous Prejudicial Information"

Colorado courts interpret "extraneous prejudicial information" to include physical materials and specific facts not admitted into evidence, as well as legal knowledge beyond that contained in jury instructions. *People v. Harlan*, 109 P.3d 616, 624-25 (Colo. 2005); *Kendrick*, 252 P.3d at 1064. However, such information does not include either "background professional and educational experience," *Kendrick*, 252 P.3d at 1066, or "personal knowledge, obtained before the trial began," *People v. Holt*, 266 P.3d 442, 445 (Colo. App. 2011). For example, a juror's mathematics and engineering background is not extraneous. *Kendrick*, 252 P.3d at 1067. In contrast, specific salary estimates, not offered in evidence, introduced by a juror during deliberations to calculate damages are extraneous. *Destination Travel, Inc. v. McElhanon*, 799 P.2d 454, 456-57 (Colo. App. 1990).

The Colorado Supreme Court's touchstone in identifying extraneous information is whether "the experience used by the juror in deliberations [is] part of the juror's background, gained before the juror was selected to participate in the case and not as the result of independent investigation into a matter relevant to the case." *Kendrick*, 252 P.3d at 1066. A clear application of this principle is *People v. Harlan*, 109 P.3d at 632. In finding a juror's use of a bible during deliberations extraneous, the supreme court explained:

> We do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs . . . . We hold only that it was improper for a juror to

> bring the Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations; the texts had not been admitted into evidence or allowed pursuant to the trial court's instructions.

Id.; *accord Holt*, 266 P.3d at 446.

Here, Juror 11's alleged statements of bias during deliberations illustrated beliefs about an ethnic minority group, formed by his experiences. His opinions were not the result of an independent investigation performed after being sworn to serve on the jury. Rather, Juror 11 viewed the testimony before him through the lens of his experiences and personal beliefs. While these beliefs may be repugnant, they are no more "extraneous" to deliberation than a juror's religious beliefs, as discussed in *Harlan*.

A few cases from other jurisdictions consider racial bias "extraneous prejudicial information."[3] These cases are unpersuasive because they do not provide, nor does defendant offer, a distinction between beliefs about race and religious beliefs, as discussed in *Harlan*. Nor

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[3] *E.g., Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (conflating "extraneous prejudicial information" and "outside influence" exceptions when concluding, "[T]he statements in the juror's affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by improper influences and . . . they are not merely matters of jury deliberations."); *State v. Hidanovic*, 2008 ND 66, ¶¶ 21-27, 747 N.W.2d 463, 472-75 (mentioning granting a new trial based on the effect "extraneous" information has on an average jury, but basing admissibility on other theories). *Contra United States v. Benally*, 546 F.3d 1230, 1237-38 (10th Cir. 2008); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373-74 (5th Cir. 1981); *State v. Shillcutt*, 119 Wis. 2d 788, 794-95, 350 N.W.2d 686, 690 (1984).

is any principle advanced that would limit this exception to racial bias. The lack of such a limiting principle would permit inquiry into juror preconceptions based on age, gender, religion, and sexual orientation. Such broad excursions into jury deliberations are "anathema" to the jury system. *Kriho*, 996 P.2d at 167. And faced with the specter of such inquiries, jurors would be unable to perform their public service without justifiable concern for their post-verdict privacy. *Stewart*, 47 P.3d at 322.

Therefore, we conclude that the "extraneous prejudicial information" exception is inapplicable.

3. "Outside Influence"

Colorado follows a plain language approach to the CRE 606(b) exceptions, *Stewart*, 47 P.3d at 323, looking to the analogous federal rule for guidance. *Id.* at 321. Thus, when deciding whether the "outside influence" exception applies, a court must determine if a force outside the jury room exerted improper influence on a juror. *Id.* at 320. Although rarely relied on independently of the "extraneous prejudicial information" exception, this exception includes efforts to bribe a juror, threats of violence against jurors, or other means "unrelated to the internal values of the jury." 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6075 (2d ed. 1993).

Here, the affidavits do not suggest interference from any party outside the jury room. To the contrary, the statements at issue illustrate Juror 11's beliefs and opinions, which, as explained above, lie at the core of what should be considered "internal." Defendant makes no coherent argument why these statements

made within the walls of the jury room were an "outside influence."

Therefore, we further conclude that the "outside influence" exception does not apply.

Accordingly, the juror affidavits were inadmissible under CRE 606(b).

IV. Constitutionality of CRE 606(b) As-Applied

Alternatively, defendant argues that, if none of the exceptions in CRE 606(b) applies, racial bias so taints a defendant's rights under the Fifth, Sixth, and Fourteenth Amendments that refusal to consider evidence of a juror's racially biased statements during deliberations renders CRE 606(b) unconstitutional as-applied. We do not decide whether considering evidence of such bias might be constitutionally required, however, because defendant waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire.

A. Verdict Finality and Juror Privacy

CRE 606(b) codified common law protections of verdict finality and juror privacy, *Stewart*, 47 P.3d at 322, both of which are vital to the stability and freedom of the jury system. *Simpson v. Darwin Lee Stjernholm, D.C.*, 985 P.2d 31, 35 (Colo. App. 1998). Therefore, resolving an unconstitutional-as-applied challenge to CRE 606(b) requires determining what policy balance best protects trial by jury as a whole. *State v. Shillcutt*, 119 Wis. 2d 788, 802, 350 N.W.2d 686, 693 (1984); *see Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (balancing policy concerns when determining the constitutionality of an evidentiary

rule under the Sixth Amendment), *cited with approval in People v. Aldrich*, 849 P.2d 821, 825 (Colo. App. 1992); *Ravin*, 788 P.2d at 820-21 (balancing policy concerns of CRE 606(b) with fairness concerns).

The United States Supreme Court balanced similar evidentiary and constitutional concerns in *Tanner v. United States*, 483 U.S. 107 (1987), which held that analogous Fed. R. Evid. 606(b) barred juror testimony of several jurors' intoxication during portions of the trial and deliberations. While acknowledging the Sixth Amendment right to trial by a competent jury, the majority declined to hold the rule unconstitutional as-applied. Rather, it concluded that voir dire and other factors[4] were sufficient to protect this right, despite the limitations of Fed. R. Evid. 606(b). *Id.* at 126- 27.

However, lower federal courts and state courts disagree whether the *Tanner* factors adequately protect a defendant's right to trial by an impartial jury where rules such as CRE 606(b) would bar evidence of a juror's racial bias. In *Benally*, 546 F.3d at 1240-41, the Tenth Circuit found the *Tanner* factors, in particular voir dire, sufficient to protect against racial bias. While the court acknowledged that some jurors might still be prejudiced, it concluded that any further protection would jeopardize "the great benefit of protecting jury decision-making from judicial review." *Id.* at 1241. For this reason, the court declined to hold Fed. R. Evid. 606(b) unconstitutional as applied. *Cf.*

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[4] These other factors are: the court's and counsel's ability to observe jurors during trial; the ability of jurors to report misconduct by other jurors before trial; and the ability to admit nonjuror testimony to show misconduct. *Tanner*, 483 U.S. at 127.

Williams v. Price, 343 F.3d 223, 239 (3d Cir. 2003) (declining on habeas petition to hold Fed. R. Evid. 606(b) unconstitutional as-applied).

Courts that are less confident in the protection given by the *Tanner* factors do not offer common reasoning. Some courts hold the analog to CRE 606(b) unconstitutional only when a juror misrepresented information about bias in voir dire. *E.g.*, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001); *State v. Thomas*, 777 P.2d 445, 450-51 (Utah 1989). In effect, these courts read a constitutionally-compelled "voir dire exception" into the rule. Other courts reject this limited exception, instead conducting case-by-case analyses.[5] *E.g.*, *United States v. Villar*, 586 F.3d 76, 87-88 (1st Cir. 2009); *Fisher v. State*, 690 A.2d 917, 921 n.4 (Del. 1996); *Shillcutt*, 119 Wis. 2d at 805-06, 350 N.W.2d at 695. At least one court suggests support for both approaches. *E.g., State v. Hidanovic*, 2008 ND 66 ¶¶ 24-26, 747 N.W.2d 463, 473-74 (citing with approval *Henley*, 238 F.3d at 1121, creating an exception for misrepresentation in voir dire, but also stating that "racial and ethnic bias cannot be condoned in any form and may deprive a criminal defendant of a right to a fair trial by an impartial jury"). And another

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[5] The Tenth Circuit has expressed concern about the lack of any limiting principle in a case-by-case approach: "If confidentiality can be breached whenever a court, after the fact, thinks the advantages of doing so are important enough, much of the damage has already been done." *Benally*, 546 F.3d at 1241. Nor have we been able to discern any limiting principle in the cases taking this approach. Hence, if an exception is made for evidence of racial bias, this exception would apply to a variety of biases, including gender, religion, and sexual orientation. *See id.* at 1240-41.

court envisions racial bias as exempted from the rule entirely. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 89-90 (Mo. 2010) (holding that, while "[j]uror testimony about matters inherent in the verdict should be excluded," racial considerations "should have no bearing on the outcome of a trial").

B. Waiver of Constitutional Challenge to Juror Bias

A defendant has a constitutional right to a fair trial by an impartial jury, which may be defeated by the presence of a biased juror. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000). Colorado courts recognize two forms of bias in potential jurors: "bias in fact or bias conclusively presumed as a matter of law." *People v. Macrander*, 828 P.2d 234, 238 (Colo. 1992) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)). The latter form of bias is rooted in the potential juror's relationships or circumstances, *Lefebre*, 5 P.3d at 300, while actual bias is "a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties." *Macrander*, 828 P.2d at 238. Negative feelings against a defendant's race or ethnicity evince actual bias. *Lefebre*, 5 P.3d at 300.

While the United States Constitution guarantees the right to a fair trial by an impartial jury, it does not provide a particular test to ensure this right. *Frazier v. United States*, 335 U.S. 497, 511 (1948); *Wood*, 299 U.S. at 133. In Colorado, the test for juror bias is codified in section 16-10-103(1)(j), C.R.S. 2012. *Nailor v. People*, 200 Colo. 30, 32, 612 P.2d 79, 80 (1980). This section provides that a potential juror should be excused for cause if there exists "a state of mind in the juror evincing enmity or bias toward the defendant or

the state." § 16-10-103(1)(j); *see Carrillo v. People,* 974 P.2d 478, 486 (Colo. 1999) (applying section 16-10-103(1)(j) when analyzing actual bias).

"The purpose of voir dire is to determine whether a juror is biased or prejudiced in any way." *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984), *aff'd*, 716 P.2d 1111 (Colo. 1986); *accord Garcia v. Estate of Wilkinson*, 800 P.2d 1380, 1382 (Colo. App. 1990). Colorado law recognizes that the ability to challenge jurors based on voir dire is "one of the most important rights secured to an accused." *Macrander*, 828 P.2d at 243 (quoting *Pointer v. United States,* 151 U.S. 396, 408 (1894)); *see Ma v. People*, 121 P.3d 205, 210 (Colo. 2005) ("Because a criminal defendant has the constitutional right to a fair trial by an impartial jury, *see* U.S. Const. amend. VI; Colo. Const. art. II, § 16, a trial court in a criminal case must grant all valid challenges for cause.").

Given the important role voir dire serves in assuring impartial juries, criminal defendants have both the right and the duty to secure an impartial jury through "diligent inquiry" into potential jurors' racial bias. *Maes v. Dist. Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972), *cited for this proposition in People v. Baker,* 924 P.2d 1186, 1191 (Colo. App. 1996), *disagreed with on other grounds by Craig v. Carlson*, 161 P.3d 648, 655 n.3 (Colo. 2007). Failure to adequately question potential jurors during voir dire waives both a later challenge to the juror and an attack on the verdict based on information that diligent voir dire would have uncovered. *People v. Lewis*, 180 Colo. 423, 427-28, 506 P.2d 125, 127 (1973); *Ma*, 121 P.3d at 209; *People v. Asberry*, 172 P.3d 927,

930 (Colo. App. 2007); *People v. Crespin*, 635 P.2d 918, 920 (Colo. App. 1981); *see People v. Cevallos-Acosta*, 140 P.3d 116, 121 (Colo. App. 2005) (declining to find error on appeal as presumptively biased juror was not properly questioned).[6]

C. Application

No Colorado court has addressed whether the *Tanner* factors are sufficient to protect the right to a jury free of racial bias. However, we need not decide the issue here. We have upheld the trial court's factual finding that defendant did not ask about racial bias during voir dire. *See* part II.C.1, *supra*. Thus, because defendant could have asked such questions and challenged Juror 11 for cause based on his answers, defendant waived the right to assert that, as applied here, CRE 606(b) violates his right to an impartial jury.[7] *See Valdez v. People*, 966 P.2d 587, 594 (Colo. 1998) (finding that a *Batson* challenge could not be considered on appeal, as it was "incumbent on the

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[6] Other jurisdictions are in accord. *See, e.g., State v. Shepherd*, 2009 UT App 11, ¶ 5 (discussing the "requirement that a criminal defendant explore known areas of potential bias with a prospective juror or else be deemed to have waived objection to the juror on grounds of bias"); *Holmes v. State*, 65 Md. App. 428, 439-40, 501 A.2d 76, 81 (1985) ("The State says that appellant's failure to object, coupled with his expressing satisfaction with the jury impaneled, is a comparable situation which mandates the same result. Notwithstanding [that] we believe that the trial judge's failure to voir dire the jury panel as to racial bias was error, we are constrained . . . to agree with the State that appellant waived that error."), *rev'd*, 310 Md. 260, 528 A.2d 1279 (1987).

[7] If Juror 11 misrepresented his biases, post-trial relief could have been sought on that basis.

defense counsel" to raise the issue before the trial court); *Honda v. People*, 111 Colo. 279, 289-90, 141 P.2d 178, 184 (1943) (holding that the defendant waived any Equal Protection challenge to the exclusion of Japanese jurors from the jury because "[t]his issue he raised, not before the trial, but in his motion for a new trial, after the jury had been examined, selected and sworn and had tried the cause. This question was injected into the case too late to avail defendant anything.").

Defendant offers no reason to conclude here that diligent voir dire would have left his rights to a jury free of racial bias unprotected. Nor are we willing to assume that because voir dire is insufficient to protect against racial bias, waiver cannot be based on deficient voir dire. While racial issues create distinct challenges for trial counsel, many sources address conducting meaningful voir dire as to race.[8] Asking potential jurors about race may be sensitive. But appropriate lines of inquiry include asking about past experiences with racism, inquiring into positive or negative interactions with individuals of a particular race, or stating that race may be an issue in this case and asking if prospective jurors would be more comfortable serving on a different case. And the court or counsel

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[8] *See, e.g.*, Roberto Aron et al., *Trial Communication Skills* § 30:4 (2d ed. 2011); Alafair S. Burke, *Prosecutors and Peremptories*, 97 Iowa L. Rev. 1467, 1483-85 (2012) (discussing practices that prosecutors could implement to reduce Batson challenges and ensure a fair jury); *see generally* Tracy L. Treger, Note, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549, 567 (1992) (discussing a wide variety of voir dire techniques, including proper use of racial data and ways to limit harm from racial bias).

could forewarn potential jurors that, because they may be asked about bias, they have the option of being questioned in chambers. Here, similar techniques were used during defendant's voir dire, but not in the context of race.

Furthermore, while some prospective jurors may be hesitant to admit racial bias, prospective jurors may be hesitant to admit gender bias, religious bias, age bias, bias based on sexual orientation, or bias against a defendant's immigration status. Holding, as a matter of law, that voir dire was inadequate to address bias, racial or otherwise, would restrict section 16-10-103(1)(j), which allows challenges for cause based on bias, to personal bias against a specific defendant. Neither the statutory language nor any case supports such a restrictive approach.

Such a holding would defeat the core purpose of voir dire, which is to "determine whether any prospective jurors are possessed of beliefs that would cause them to be biased in such a manner as to prevent the defendant from obtaining a fair and impartial trial." *People v. Robinson*, 187 P.3d 1166, 1176 (Colo. App. 2008) (quoting *People v. Martinez*, 24 P.3d 629, 632 (Colo. App. 2000)); *accord Binkley*, 687 P.2d at 483. And such a holding would disregard the function of voir dire to alert the court, as does a contemporaneous objection, which "has a salutary purpose in the orderly administration of justice." *Scheer v. Cromwell*, 158 Colo. 427, 429, 407 P.2d 344, 345 (1965).

Although a purpose of voir dire is to identify potential juror bias, *see Binkley*, 687 P.2d at 483, the dissent's assertion that "a challenge for cause to a

juror's qualifications [being] waived through lack of diligence[] should only apply to cases where the basis for a challenge is known during voir dire" would discourage diligent voir dire concerning such bias. In a racially charged case, a defendant might avoid this subject in voir dire and gamble on a favorable verdict. In the event of an adverse verdict, the defendant could conduct post-verdict investigation of jurors and use information that might have been discovered through voir dire to attack the verdict. But a defendant is not "entitled to gamble on a more favorable verdict than that which he might otherwise have received and then, when such verdict is returned, have the option of having it set aside and calling for a new trial." *Ellis v. People*, 114 Colo. 334, 344, 164 P.2d 733, 737 (1945).

Colorado courts adhere to the rule that "[a] challenge for cause is waived if counsel does not use reasonable diligence during jury selection to determine whether the grounds for such a challenge exist." *Asberry,* 172 P.3d at 930. This waiver rule has never been limited, as the dissent urges, based on ignorance of what diligent inquiry could have unearthed. And our courts do not "reward . . . self-induced ignorance." *McGee v. Hardina*, 140 P.3d 165, 167 (Colo. App. 2005). Hence, we decline to adopt such a limitation.

Furthermore, a waiver based on counsel's failure to adequately question jurors in voir dire is not subject to the "knowing, voluntary, and intentional" standard used for waivers of certain rights by defendants, as the dissent suggests it should be. Examples of waivers subject to this standard include the right to counsel, the right of a defendant to testify, the entrance of a guilty plea, *Hinojos-Mendoza v. People*, 169 P.3d 662,

669 (Colo. 2007), and the right to trial by jury. *Id.*; *People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985); *People v. Thompson*, 121 P.3d 273, 275 (Colo. App. 2005). However, "as to other rights [d]efense counsel stands as captain of the ship," *Hinojos-Mendoza*, 169 P.3d at 669 (quoting *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984)), and waiver need not be made personally by the defendant. *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008).

No Colorado case holds that voir dire into juror bias, exercising challenges for cause, and passing the panel for cause are decisions made only by the defendant.[9] Rather, strategic decisions about voir dire are exercisable by counsel. *See People v. Moody*, 676 P.2d 691, 696 (Colo. 1984) (referring to decisions whether to challenge a juror as "merely a matter of trial strategy"); *People v. Osorio*, 170 P.3d 796, 800

[9] Requiring that a defendant participate – knowingly, voluntarily, and intentionally – in voir dire and challenges for cause would be unworkable. For example, the trial court would have to fashion an advisement that explained the nuances of the tactical decisions made in voir dire. *Cf. People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989) (requiring the record to "clearly show[] that the defendant understands the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter" before finding a waiver of the right to counsel) (internal citations omitted). Then the court would need to obtain the defendant's consent to each proposed challenge for cause. The complexities of the tactical decisions required in voir dire, *see* 1 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 4:5 (6th ed. 2006) (discussing the importance of, and many strategies necessary for, analyzing the venire when selecting jurors), would leave such consent subject to dispute in postconviction proceedings.

(Colo. App. 2007) (determining a failure to challenge a biased juror to be "sound trial strategy"). And even though such decisions implicate constitutional rights, trial counsel has the power to bind the defendant.[10] *See Curtis*, 681 P.2d at 511 ("We have stated that decisions committed to counsel include . . . what jurors to accept or strike, and what trial motions to make. It is worth noting that these latter decisions also have a constitutional basis.") (internal citations omitted); *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to

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[10] *United States v. Zarnes*, 33 F.3d 1454 (7th Cir. 1994), and *United States v. Desir*, 273 F.3d 39 (1st Cir. 2001), cited in the dissent, do not suggest a different conclusion. In *Zarnes*, the defendant claimed that a bifurcated trial violated the Sixth Amendment. The circuit court held that the defendant had "knowingly and voluntarily" waived his claim based on a conversation with the trial court. *Zarnes*, 33 F.3d at 1472. The circuit court also found waiver because defense counsel had requested bifurcation. *Id.* (citing *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990) (discussing that defendants waive their Sixth Amendment challenges when counsel makes a tactical decision to consent to bifurcation)). The circuit court did not apply the "knowing[] and voluntar[]y" standard that it applied when finding personal waiver by the defendant.

Desir involved a Fed. R. Crim. P. 33 motion for post-conviction relief based on "newly discovered" evidence. The defendant claimed that a juror was a personal acquaintance who knew of the defendant's criminal record, violating the right to an impartial jury. *Desir*, 273 F.3d at 42. The trial court determined that the defendant had recognized the juror before deliberations and, therefore, had waived his challenge. *Id.* at 42-43. The circuit court refused to disturb these findings, as they had record support, and upheld the trial court's denial of relief. *Id.* at 43. Neither court applied a "knowing and voluntary" standard to this waiver.

the counsel the power to make binding decisions of trial strategy in many areas. On issues of trial strategy, defense counsel is captain of the ship.") (internal citations omitted); *People v. Rogers*, 2012 COA ___, ¶ ___ (Colo. App. No. 11CA0019, Nov. 8, 2012) (citing *Cropper v. People*, 251 P.3d 434, 435 (Colo. 2011)) (acknowledging that counsel may waive a client's Sixth Amendment confrontation right).

Therefore, while counsel may, in fact, decide for strategic reasons not to question jurors on racial bias, a defendant cannot claim his rights were violated when an opportunity existed to protect those rights but his counsel failed to do so for tactical reasons. *See People v. Mann*, 646 P.2d 352, 358 (Colo. 1982) ("The decision not to serve [a key witness], when there was ample opportunity, was a trial tactic, subject to the risk of backfiring, and thus the defendant is not entitled to complain that she was deprived of the right to present testimony."); *People v. Peterson*, 656 P.2d 1301, 1304 (Colo. 1983) ("When defense counsel's strategy backfires, the resultant error cannot be urged as grounds for reversal on appeal."); *People v. Rowerdink*, 756 P.2d 986, 993 (Colo. 1988) ("[W]e held that, when defense counsel's strategy backfires, the resultant error cannot be grounds for reversal on appeal.").[11]

Alternatively, even if deficient voir dire does not constitute a waiver, courts should not "resolve constitutional questions or make determinations

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[11] By discussing adverse effects of trial strategy, we do not express an opinion on how an ineffective assistance of counsel claim based on these effects should be resolved.

regarding the extent of constitutional rights unless such a determination is essential and the necessity for such a decision is clear and inescapable." *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190, 194 (Colo. 2005); *accord People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). Here, what adequate inquiry into racial bias would have uncovered is unknowable. However, defendant asks us to create a potentially broad constitutional exception to CRE 606(b) in order to vindicate a right that he failed to protect at trial. Hence, we decline to decide what additional constitutional safeguards, if any, would be necessary, had defendant diligently performed voir dire. *See Cropper*, 251 P.3d at 438 (declining to hold a statute unconstitutional as-applied because the defendant did not avail herself of the constitutional protections under the statute); *cf. New Safari Lounge, Inc. v. City of Colorado Springs*, 193 Colo. 428, 434-35, 567 P.2d 372, 377 (1977) (finding a statute constitutional as applied to the facts in the case but not deciding whether the statute would be unconstitutional under different facts); *Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1087 (Colo. 2011) (holding that an as-applied challenge to a punitive damage award was not preserved, as no limited-purpose instruction was requested). Determining the extent that the Sixth Amendment requires protections beyond those already provided by law is neither necessary nor inescapable. *Cf. Kirkmeyer v. Dep't of Local Affairs*, ___ P.3d ___, ___ (Colo. App. No. 09CA0725, Mar. 31, 2011) (reaching constitutionality as-applied when interpreting a statute is "inextricably intertwined" with arguments on remand, while declining to do so otherwise).

Therefore, we conclude that because defendant failed to inquire into racial bias in voir dire, we will not decide whether the constitutional balance requires CRE 606(b) to yield.[12]

V. Juror Access Limitations

Defendant contends that the trial court misapplied Crim. P. 24(a)(4) and Crim. P. 33(c) when limiting his access to jurors before the evidentiary hearing, interfering with his rights under the United States and Colorado Constitutions. However, this interference does not amount to constitutional error, and because any error in limiting access to jurors after trial was harmless, we do not reverse.

A. Standard of Review

Under the general harmless error standard, appellate courts reverse only when the record suggests that an error substantially affected the fairness of proceedings. *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989). Yet, if the error is of a sufficient "constitutional dimension," reversal is required unless the error is harmless beyond a reasonable doubt. *People v. Smith*, 121 P.3d 243, 249 (Colo. App. 2005).

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[12] We take no position on whether *Benally*'s analysis of the *Tanner* factors would control appropriately preserved constitutional challenges to CRE 606(b).

B. Preservation

The Attorney General's assertion that defendant failed to preserve this issue is unpersuasive. Defendant moved for access to all juror contact information in anticipation of seeking an evidentiary hearing into grounds for new trial. Instead, the trial court required defense counsel to detail the "who, what, when, and where" of the alleged misconduct before limiting contact to only the female jurors. Further, defendant was allowed to obtain affidavits from only the two jurors who approached defense counsel after trial, reporting that Juror 11 was racially biased. Thus, the trial court denied defendant's motion, at least in part. Therefore, defendant is able to appeal the trial court's restrictions. *Cf. Resolution Trust Corp. v. Parker*, 824 P.2d 102, 104 (Colo. App. 1991) (finding objection to denial of motion for change of venue unnecessary for preservation on appeal).

C. Defendant's Argument

Defendant argues that the trial court abused its discretion by erroneously interpreting Crim. P. 33(c)[13] as requiring affidavits substantiating claims of juror misconduct before allowing access to juror contact information. Defendant concedes that Crim. P. 33(c) requires a party to file supporting affidavits when moving for a new trial, but argues that the court's reliance on Crim. P. 33(c) *before* he moved for a new trial inappropriately barred access to jurors.

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[13] Crim. P. 33(c) provides, in relevant part, "[a] motion based upon newly discovered evidence or jury misconduct shall be supported by affidavits."

In addition, defendant asserts that parties should have unfettered post-trial access to jurors absent evidence of harassment or criticism of the jurors' service. For this proposition, he cites public policy considerations[14] and Crim. P. 24(a)(4).[15] Defendant also argues that Crim. P. 24(a)(4) controls beyond voir dire and compelled the trial court to give defense counsel "appropriate and necessary locating information" for the jurors post-trial.

D. Analysis

The United States Constitution does not guarantee a defendant the right to question jurors post-verdict. *Cf. Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019,

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[14] *E.g., Stewart*, 47 P.3d at 325 ("Jurors are free to discuss any aspect of their service they care to."); Model Code of Prof'l Responsibility EC 7-29 (1983) ("Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge."). Defendant asserts that these policy concerns amount to constitutional violations. Yet, the one case defendant cites for this proposition, *People v. Dillon*, 739 P.2d 919 (Colo. App. 1987), is inapplicable. *See id.* at 921(stating ineffective assistance of counsel must be predicated on "counsel's conduct so undermin[ing] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

[15] "Orientation And Examination Of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges. . . . (4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information." Crim. P. 24(a).

1021 (5th Cir. 1984) ("Federal courts have generally disfavored post-verdict interviewing of jurors."); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("[C]ourts have routinely shielded jurors from post-trial 'fishing expeditions' carried out by losing attorneys interested in casting doubt on the jury's verdict."); *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976) (questioning of jurors is appropriate unless "there is some showing of illegal or prejudicial intrusion"). Defendant does not argue that we should interpret the Colorado Constitution more broadly that the United States Constitution in this regard. Thus, we discern no constitutional basis for defendant's juror access claim,[16] as opposed to misapplication of procedural rules. Hence, we apply the harmless error standard, and will not reverse unless the error substantially affected the fairness of the proceedings.

Assuming, while not deciding, that the trial court erred or abused its discretion in applying Crim. P. 24(a)(4) and Crim. P. 33(c), we find any error harmless. Defendant sought juror information to determine if Juror 11 had failed to disclose his law enforcement connections and possible biases in voir dire. After examining the voir dire, the court held an evidentiary hearing limited to Juror 11's law enforcement connections. Additional information that defendant could have obtained from jurors is irrelevant to the sole basis for the court's decision on the scope of the evidentiary hearing – what was asked in voir dire.

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[16] *See supra* note 14.

At the evidentiary hearing, Juror 11 was questioned about his law enforcement experience, as well as having friends and relatives who served in law enforcement. After hearing the testimony, the trial court determined that, given the high threshold to show actual bias, *supra* Part II.B, Juror 11's answers did not merit a new trial. We fail to understand, and defendant does not suggest, what additional questions Juror 11 would have been asked, had defendant contacted other jurors.

Even if defendant could have obtained from other jurors additional information of statements by Juror 11 showing actual bias, any statements made during deliberations would still be inadmissible under CRE 606(b). *Supra* Part III. And we have declined to adopt any exception for a racially biased juror, because we agree with the trial court that defendant failed to explore this subject in voir dire. *Supra* Part IV. Hence, even if defendant could have obtained other statements of bias made by Juror 11 during deliberations, the result would be the same.

Therefore, we conclude that any error was harmless.[17]

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[17] Our conclusion of harmlessness is not approval of the trial court's actions. The severe limitations on juror access seem unnecessary given defendant's legitimate interest in investigating possible constitutional violations.

VI. Impaneling a Numbers Jury

Finally, we conclude the trial court did not commit plain error by impaneling a numbers jury.

A. Standard of Review

When the defendant fails to object to a trial court empaneling a numbers jury, appellate review is for plain error. *People v. Robles*, ___P.3d___, ___ (Colo. App. No. 06CA0934, Mar. 31, 2011) (*cert. granted* Sept. 12, 2011). Plain error requires an error that is both obvious and so undermines a trial's fairness that it casts doubt on the reliability of the conviction. *Id.*

B. Analysis

A division of this court in *People v. Robles*, ___P.3d at ___, found that referring to jurors solely by number does not cast serious doubt on a trial's fairness when:

- Neither the court nor counsel commented on the use of numbers rather than names;
- There was no indication of the procedure being unusual;
- Neither the court nor the counsel indicated that referring to jurors by number implied that defendant was dangerous;
- Defendant was able to conduct meaningful voir dire despite use of numbers rather than names. *Id.*

The record shows these same factors here. The trial court told counsel that it was common practice to refer to jurors solely by number and no further mention was made of this process by anyone. Also, the use of numbers did not impact the effectiveness of voir

dire. Defendant does not indicate why *Robles* should not control and we decline to deviate from its reasoning.

Therefore, the trial court did not commit plain error.

VII. Conclusion

The judgment of conviction is affirmed.

JUDGE LOEB concurs.

JUDGE TAUBMAN dissents.

JUDGE TAUBMAN dissenting.

This case presents the important issue of whether CRE 606(b) must yield to the Sixth Amendment right to an impartial jury where evidence is presented of a juror's previously unknown racial bias arising during jury deliberations. Although this is an issue of first impression in Colorado, numerous state and federal courts are divided on the issue. Because I disagree with the majority that CRE 606(b) prohibits consideration of Juror 11's apparent racial bias, I respectfully dissent. To the contrary, I would hold that CRE 606(b) must yield to the Sixth Amendment right of defendant, Miguel Angel Pena-Rodriguez, to an impartial jury, because racial bias apparently influenced Juror 11's decision-making process. Accordingly, I believe the trial court erred by not considering evidence of racial bias arising during deliberations, and by limiting the scope of Pena-Rodriguez's motion for new trial to the issue of whether Juror 11 misrepresented his law enforcement background. Further, I would reverse Pena-Rodriguez's conviction and remand for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt.

I. Background

I adopt the majority's recitation of the relevant facts, but reiterate those important to my dissent.

Following Pena-Rodriguez's trial and conviction, two affidavits from other jurors were obtained by Pena-Rodriguez's counsel. These affidavits stated, among other things, that Juror 11 had made

statements during jury deliberations which indicated he based his decision on racial bias.[1]

The first affidavit stated that Juror 11 said, "I think he did it because he is Mexican and Mexican men take what they want." The affidavit also stated that Juror 11 "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." The second affidavit noted:

> [Juror 11] believed that the defendant was guilty because in his experience as [an] ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women. . . . He said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls. . . . He said that he did not think the alibi witness

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[1] I recognize that courts have referred to people of Hispanic heritage as belonging to racial, ethnic, and national origin groups. *See, e.g.*, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 504 (1986) (Hispanic firefighters alleged they had been discriminated against by reason of their race and national origin); *United States v. Villar*, 586 F.3d 76, 84 (1st Cir. 2009) (discussing jury discrimination against a Hispanic defendant as racial and ethnic bias); *People v. Mendoza*, 876 P.2d 98, 101 (Colo. App. 1994) (prima facie evidence of racial discrimination existed where the prosecution used five peremptory challenges to eliminate Hispanic jurors). However, because people of Hispanic heritage belong to a distinct racial group, I limit my discussion to racial prejudice. *Mendoza*, 876 P.2d at 101.

was credible because, among other things, he was "an illegal."

The trial court declined to consider this evidence in conjunction with Pena-Rodriguez's motion for a new trial, because Pena-Rodriguez did not question the jurors specifically regarding racial bias in voir dire, and because the court believed such testimony to be barred by CRE 606(b).

II. Preservation of Constitutional Challenge

The majority holds that because Pena-Rodriguez did not ask questions specifically related to racial bias during voir dire, his constitutional as-applied challenge to CRE 606(b) fails. I disagree.

A. Standard of Review

The majority applies an abuse of discretion standard and defers to the trial court's determination that Pena-Rodriguez did not ask sufficient questions regarding racial bias during voir dire. I disagree with the application of this standard, and would instead review the trial court's conclusion de novo.

Whether the questions asked during voir dire were sufficient is a mixed question of fact and law. *People v. Matheny*, 46 P.3d 453, 461-62 (Colo. 2002). Under this standard, historical facts are entitled to deference, while the application of those facts to a legal standard is reviewed de novo. *Id.* at 461. Further, whether a defendant waived his or her constitutional rights is a question we review de novo. *See People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010); *People v. Aguilar-Ramos*, 86 P.3d 397, 400-01 (Colo. 2004).

Here, the historical facts include questioning during voir dire. To the extent these facts were at issue, I would afford deference to the trial court's findings. However, whether the voir dire legally constituted a sufficient inquiry into potential racial bias is a question of law that must be reviewed de novo. Accordingly, I believe it is necessary to conduct a de novo review of whether the questions asked sufficiently addressed racial bias before deciding whether Pena-Rodriguez's failure to ask certain questions regarding racial bias constitutes a waiver of his right to an impartial jury.

B. Duty During Voir Dire

The majority relies on *Maes v. District Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972), to support the conclusion that Pena-Rodriguez had an obligation to explicitly question jurors regarding racial bias, and that his failure to do so resulted in a waiver of his constitutional right to a fair trial. However, I do not read *Maes* to create such an obligation.

In *Maes*, the defendant attempted to question potential jurors about racial bias during voir dire. *Id.* at 172, 503 P.2d at 623. The prosecution objected to such questioning. The trial court concluded that unless proof of the defendant's racial background would be presented, the defendant could not ask questions about race during voir dire. After assurances from the defendant's counsel that such proof would be presented, the trial court allowed the questioning. However, the defendant never offered proof regarding his racial background. *Id.* Accordingly, the trial court granted the prosecution's motion for mistrial. *Id.*

The supreme court reversed the trial court's ruling, holding that the defendant's "right to inquire on voir dire concerning prejudice against a person of a minority race" is undisputed. *Id.* at 175-76, 503 P.2d at 624-25. In dictum, the court added, "It was counsel's duty to make diligent inquiry into the existence of potential prejudice that might exist in the jurors' minds by reason of petitioner's racial heritage." *Id.* at 176, 503 P.2d at 625; *see also Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (where a statement of the court is not part of its "holding and its necessary rationale," it is dictum).

For two reasons, I do not read the court's dictum to create a rule that requires counsel to explicitly inquire into issues of racial bias. First, dictum is not controlling precedent. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633, 640 (Colo. App. 2004). Second, even if the court's statement is controlling, it does not oblige defense counsel to explicitly question jurors regarding racial bias. Rather, it creates a right for counsel to ask questions necessary to eradicate racial bias from a jury.

As discussed below, Pena-Rodriguez's counsel asked sufficient questions during voir dire to satisfy this obligation. Counsel was not required to ask specifically about racial bias, because legitimate tactical considerations militated against doing so. In *United States v. Villari*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)), the First Circuit recognized that,

> many defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to

> jurors or as raising an issue defense counsel does not want to highlight. . . . [V]oir dire using questions about race or ethnicity may not work to a defendant's benefit where one of the [suspects] was described [based on his race].

Similarly, questions specifically addressing racial prejudice may be less effective in detecting racial bias than open-ended questions regarding a juror's ability to be fair. *See* Roberto Aron et al., *Trial Communication Skills* § 30:4 (2d ed. 2011) ("Counsel should ask potential jurors open-ended questions and let them talk about themselves, so as to better perceive those attitudes and beliefs potentially relevant to the case that might otherwise remain hidden.")[2] A juror would likely feel more comfortable stating that he or she may not be able to be fair to a defendant generally, rather than admitting in open court that he or she harbored racial prejudice. *See generally Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("[a] juror may have an interest in concealing his own bias"). Accordingly, trial counsel may decide that they would be more successful in detecting a biased juror through open-ended questioning, rather than questions addressing specific biases.

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[2] The majority opinion cites this authority, and others, to support its conclusion that Pena-Rodriguez should have asked questions specifically addressing racial bias. However, this authority notes that open-ended questions are better for detecting racial and other biases. Thus, this observation conflicts with the majority's assertion that specific questioning regarding bias was required to preserve Pena-Rodriguez's constitutional challenge.

Thus, it is unlikely the supreme court intended to create an absolute rule, which could cause a defendant's race to prejudice him or her. At most, *Maes* requires counsel to ensure that sufficient questions are asked during voir dire to determine whether the jurors are "capable and willing to decide the case solely on the evidence before [them]." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *People v. Wilson*, 114 P.3d 19, 24 (Colo. App. 2004) ("A trial court must receive some assurance from a prospective juror that he or she is willing and able to accept the basic principles of criminal law and to render a fair and impartial verdict based upon the evidence admitted at trial and the court's instructions.").

Here, sufficient questions were asked during voir dire to establish that the jurors would base their verdict on the facts of the case, rather than on bias or prejudice. Specifically, the jurors were asked whether they could "render a verdict solely on the evidence presented at trial and the law," without regard to "any other ideas, notion, or beliefs about the law." *See Wilson*, 114 P.3d at 24. They were also asked whether they had "a feeling for or against the Defendant." Accordingly, I conclude that Pena-Rodriguez did not have an obligation to ask questions specifically addressing racial bias.

C. Waiver of Constitutional Rights

Even if Pena-Rodriguez was obligated to ask further about racial bias, for three reasons his failure to do so would not result in a waiver of his constitutional right to an impartial jury. First, nothing in *Maes* suggests that the supreme court intended for

such a waiver to occur. Second, in reaching its conclusion that Pena-Rodriguez waived his rights, the majority cites five cases: *People v. Asberry*, 172 P.3d 927 (Colo. App. 2007); *Ma v. People*, 121 P.3d 205 (Colo. 2005); *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981); *People v. Lewis*, 180 Colo. 423, 427-28, 506 P.2d 125, 127 (1973); and *People v. Cevallos-Acosta*, 140 P.3d 116, 121 (Colo. App. 2005), all of which are distinguishable. Third, Pena-Rodriguez did not waive his rights knowingly, voluntarily, and intelligently.

First, *Maes* did not address the question of waiver at all. Its above-quoted language about the "duty" of defense counsel was dictum, as noted above.

Second, the cases on which the majority relies are distinguishable. *Asberry*, *Ma*, *Crespin*, and *Lewis* are distinguishable because they involve waiver of a defendant's right to challenge a juror where the defendant knew of the juror's disqualifying characteristic, but failed to adequately challenge the juror on that ground. None of the cases cited by the majority involves an instance where the defendant was unaware of a juror's potential or actual bias. Here, however, Pena-Rodriguez had no knowledge of Juror 11's alleged bias. Accordingly, the rule set forth in these cases, that a challenge for cause to a juror's qualifications is waived through lack of diligence, should only apply to cases where the basis for a challenge is known during voir dire. Thus, these cases are distinguishable.

Cevallos-Acosta is also distinguishable, because the division declined to consider a denial of a challenge for cause because the defendant failed to preserve his challenge. 140 P.3d at 121. Here, however, defendant

preserved his challenge by moving for a new trial after receiving evidence of Juror 11's bias. Additionally, the juror in *Cevallos-Acosta* affirmatively stated that he could be impartial despite the defendant's race – thereby disproving the existence of actual bias under section 16-10-103(1)(j). 140 P.3d at 122.

Accordingly, these cases do not support the majority's conclusion that the failure to ask questions about race during voir dire prevents a defendant from making an as-applied constitutional challenge to CRE 606(b), based on previously unknown bias and the Sixth Amendment right to an impartial jury.

Third, Pena-Rodriguez did not waive his right to an impartial jury knowingly, voluntarily, and intentionally. Although there is no Colorado case discussing the waiver of a defendant's constitutional right to an impartial jury, our courts have held that a waiver of a defendant's Sixth Amendment right to a jury must occur knowingly, voluntarily, and intentionally. *Hinojos-Mendoza v. People*, 169 P.3d 662, 669 (Colo. 2007); *People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985); *People v. Thompson*, 121 P.3d 273, 275 (Colo. App. 2005). Similarly, waiver of other fundamental constitutional rights must be done by the defendant, knowingly, voluntarily, and intentionally. *Hinojos-Mendoza*, 169 P.3d at 669 ("The right to counsel, the right to testify, the right to trial by jury, and the entrance of a guilty plea are sufficiently personal and fundamental as to require a voluntary, knowing, and intentional waiver by the defendant himself."). The Sixth Amendment right to a jury, however, also requires that a jury be impartial. U.S. Const. amend. VI; *People v. Lefebre*, 5 P.3d 295, 300

(Colo. 2000). Accordingly, it would follow that a waiver of the right to an impartial jury would similarly have to be made knowingly, voluntarily, and intentionally. Federal courts have reached similar conclusions. *See United States v. Zarnes*, 33 F.3d 1454, 1472 (7th Cir. 1994) ("A waiver [of the right to an impartial jury] must be knowing and voluntary."); *see also United States v. Desir*, 273 F.3d 39, 43 (1st Cir. 2001) (a defendant waives his or her right to an impartial jury if he or she knowingly withholds information of jury bias from the court).

The majority cites *State v. Shepherd*, 2009 UT App. 11, ¶ 5 (unpublished memorandum decision), for the proposition that failure to adequately question jurors about racial bias during voir dire waives a Sixth Amendment challenge to an impartial jury. However, in *Shepherd*, the court only held that a defendant's waiver of the right to an impartial jury must be knowing. *Id.* (discussing the "requirement that a criminal defendant explore *known* areas of potential bias with a prospective juror or else be deemed to have waived objection to the juror on grounds of bias") (emphasis added). In *Shepherd*, the defendant was aware that the challenged juror knew him, but failed to bring this to the court's attention. *Id.* at ¶ 6. Accordingly, the court held that he knowingly waived his right to challenge the juror.

Holmes v. State, 65 Md. App. 428, 439-40, 501 A.2d 76, 81 (1985), *rev'd on other grounds*, 310 Md. 260, 528 A.2d 1279 (1987), stands for a similar proposition. *Id.* at 432-40, 501 A.2d at 78-83 (defendant waived his right to challenge the trial court's decision not to ask about race during voir dire

when he requested the judge to ask such questions, but then failed to object when the judge did not do so).

Finally, *People v. Rogers*, 2012 COA ___, ¶ ___ (Colo. App. No. 11CA0019, Nov. 8, 2012), is also distinguishable because it involves intentional waiver of a constitutional right. There, the defendant intentionally introduced testimonial evidence by opening the door to the evidence. *Id.* Here however, Pena-Rodriguez did not intentionally waive his right to challenge his verdict based on an impartial jury. Rather, he obtained assurances from the jurors during voir dire that they could decide the case impartially. That he did not explicitly explore the issue of racial bias does not constitute an intentional waiver of his right to an impartial jury.

Here, Pena-Rodriguez did not waive his right to an impartial jury knowingly and voluntarily. At no point before or during trial was he aware of Juror 11's apparent racial bias. Additionally, the lack of questioning specifically addressing racial bias cannot be considered a knowing and voluntary waiver of a fundamental constitutional right. *See People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) ("The courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver."); *Palmer v. People*, 680 P.2d 525, 527 (Colo. 1984) (a knowing and voluntary waiver of a fundamental constitutional right cannot be inferred from silence).

Holding that the Sixth Amendment right to an impartial jury outweighs CRE 606(b) would not render section 16-10-103(1)(j) a nullity. As I state below, my opinion is limited to the facts in this case – apparent

racial prejudice of one juror. Section 16-10-103(1)(j), however, applies to any situation in which a juror's state of mind evinces bias against a party. Accordingly, while my opinion may limit application of this statute in those cases in which allegations arise of a racially biased juror, it does not render the statute a nullity.

Accordingly, I conclude Pena-Rodriguez did not waive his Sixth Amendment right to an impartial jury, and therefore may challenge Rule 606(b) as applied.

III. Sixth Amendment

Pena-Rodriguez asserts that CRE 606(b) is unconstitutional as applied because it prevents him from protecting his Sixth Amendment right to an impartial jury. I agree.[3]

A juror compromises the constitutional guarantees of our justice system when he or she forgoes his or her role as a fact finder and, instead, forms conclusions of guilt or innocence based on racial bias. "A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he

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[3] I do not disagree with the majority's discussion of the general application and function of CRE 606(b) in section III.B. of the majority opinion. However, because I conclude that the Sixth Amendment requires consideration of racial bias arising during jury deliberations, I do not need to decide whether evidence of bias would also be admissible under the exceptions contained in CRE 606(b)(1) and (2). I would note, however, that federal and state courts have allowed consideration of such evidence under these exceptions, in rules identical to CRE 606. *See Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979); *State v. Bowles*, 530 N.W.2d 521, 236 (Minn. 1995).

cannot judge because he has prejudged." *Turner v. Murray*, 476 U.S. 28, 43 (1986) (Brennan, J., concurring). Thus, when the trial court obtains clear evidence of racial bias by a deliberating juror, the policy considerations supporting CRE 606(b) must yield to the Sixth Amendment right to an impartial jury. If we were to hold otherwise, "the jury system may survive, but the constitutional guarantee on which [the jury system] is based will become meaningless." *Tanner v. United States*, 483 U.S. 107, 142 (1987) (Marshall, J., concurring in part and dissenting in part).

Colorado courts have consistently held that "an impartial jury is a fundamental element of the constitutional right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *see also Harris v. People*, 888 P.2d 259, 264 (Colo. 1995) ("the right to trial includes the right to trial by an impartial jury empaneled to determine the issues solely on the basis of the evidence introduced at trial rather than on the basis of bias or prejudice for or against a party"); *People v. Chavez*, ___ P.3d ___, ___ (Colo. App. No. 08CA2144, July 21, 2011) (same). In the context of excusing jurors for cause, "[a] defendant's right to an impartial jury is violated if the trial court fails to remove a juror biased against the defendant." *Morrison*, 19 P.3d at 672. Thus, "[w]here a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated." *Brisbin v. Schauer*, 176 Colo. 550, 552, 492 P.2d 835, 836 (1971), *overruled on other grounds by Marshall v. Kort*, 690 P.2d 219 (Colo. 1984).

The right to a jury free of racial bias is of particular importance. *See Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("if any [juror] was shown to entertain a [racial] prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit"). Allowing a racially biased person to sit on a jury provides "[n]o surer way . . . to bring the processes of justice into disrepute." *Maes*, 180 Colo. at 176, 503 P.2d at 625 (quoting *Aldridge*, 283 U.S. at 315). Accordingly, courts must exercise the utmost care to ensure that verdicts are reached based on the facts of the case rather than racial bias. *See generally Smith*, 455 U.S. at 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.").

Batson v. Kentucky, 476 U.S. 79 (1986), highlights the fundamental requirement of a jury that is free from racial bias and discrimination. There, the Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. In doing so, the Court noted its "unceasing efforts to eradicate racial discrimination" in jury selection. *Id.* at 85.

The interest in ensuring an impartial jury has led federal and state courts to recognize that "rule[s] against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias

during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87; *see also Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("Certainly, if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."), *aff'd*, 732 F.2d 1048 (2d Cir. 1984); *Fisher v. State*, 690 A.2d 917, 920 n.4 (Del. 1996) (the need to eradicate racial bias in juries outweighs the policy interests behind Delaware Rule of Evidence 606(b)). The Supreme Court recognized early on that, "it would not be safe to lay down any inflexible rule [banning juror testimony] because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)).

As the majority opinion notes, numerous state and federal courts have admitted evidence of racial bias, arising from jury deliberations, through multiple theories – both constitutional and rule-based. *See, e.g.*, *Villar*, 586 F.3d at 84-88 (finding Fed. R. Evid. 606(b) unconstitutional as applied when it bars evidence of racial bias); *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (finding persuasive those cases admitting evidence of racial juror bias, but deciding the case on other grounds); *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (admitting evidence under Rule 606(b)'s extraneous prejudicial influences exception); *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 89 (Mo. 2010) (equal protection and the right to an impartial jury require admission of such

evidence); *State v. Hidanovic*, 747 N.W.2d 463, 474-75 (N.D. 2008) (the right to a fair trial and impartial jury would require Rule 606(b) to yield); *Fisher*, 690 A.2d at 920 n.4 (same); *see also* Leah S.P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of* Tanner *and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. Pa. J. Const. L. 537 (2011).

On appeal, the People rely on *Tanner* and *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008).[4] However, I conclude that *Tanner* is distinguishable from cases involving issues of racial bias in juries. Therefore, I further conclude that *Benally* improperly relied on *Tanner*.

In *Tanner*, the defendant attempted to introduce juror testimony that during deliberations some jurors were intoxicated. *Tanner*, 483 U.S. at 116-17. The Supreme Court held that the juror testimony was barred by Fed. R. Evid. 606(b), when used to impeach the jury's verdict. *Id.* at 122. However, *Tanner* is

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[4] *Benally*, in turn, relied on *Williams v. Price*, 343 F.3d 223, 235-37 (3d Cir. 2003). *Benally*, 546 F.3d at 1236. There, the Third Circuit held that "state courts did not violate 'clearly established Federal law' in refusing to consider" statements regarding racial bias made during jury deliberations. *Williams*, 343 F.3d at 236. However, the court's analysis was limited to habeas corpus review. *Id.* at 228-29. Accordingly, judges and commentators have criticized *Benally*'s reliance on *Williams* in applying the holding to a direct appeal. *See, e.g.*, *United States v. Benally*, 560 F.3d 1151, 1154 (10th Cir. 2009) (Briscoe, J., dissenting), *denying reh'g en banc* 546 F.3d 1230; *Rabin*, 14 U. Pa. J. Const. L. at 547-48; Brandon C. Pond, Note, *Juror Testimony of Racial Bias in Jury Deliberations:* United States v. Benally *and the Obstacle of Federal Rule of Evidence 606(b)*, 2010 BYU L. Rev. 237, 246-47.

distinguishable because it did not deal with racial bias and because the jurors' intoxication did not conclusively demonstrate that the jurors would be incapable of rendering an impartial and fair verdict. *Id.* at 126. The Court noted that the "allegations of *incompetence* [were] meager," and "[t]he only allegations concerning the jurors' ability to properly consider the evidence were [the affiant's] observations that some jurors were 'falling asleep all the time during the trial,' and that his own reasoning ability was affected on one day of the trial." *Id.* (emphasis in original). Additionally, potential incompetence because of intoxication is fundamentally different from racial prejudice – the latter being more insidious and less readily observable.

In contrast, here, according to the affidavit of another juror, Juror 11 said, "I think [Pena-Rodriguez] did it because he's Mexican, and Mexican men take whatever they want." This statement, if Juror 11 indeed made it, clearly demonstrates that, unlike the jurors in *Tanner*, Juror 11 did not fairly consider the evidence presented, and instead based his decision on Pena-Rodriguez's Hispanic background. Accordingly, *Tanner* is distinguishable.

Although *Tanner* is distinguishable, its rationale is helpful to analyze whether Pena-Rodriguez's Sixth Amendment right to an impartial jury outweighs the policy interests behind enforcing CRE 606(b). In *Tanner*, the Supreme Court balanced the defendant's Sixth Amendment right to an unimpaired jury[5] against

[5] The Court's discussion in *Tanner* was limited to whether the defendant's right to an unimpaired jury allowed consideration of the juror testimony. *Tanner*, 483 U.S. at 126.

the policy interests in excluding juror testimony. 483 U.S. at 126-28. The Court noted that the policy interests include promoting the finality of judgments, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-21. In contrast, the Court concluded that four factors protect a defendant's Sixth Amendment right to an unimpaired jury: (1) the ability of the court and counsel to observe jurors during trial, (2) the ability of jurors to be questioned during voir dire, (3) the ability of jurors to report misconduct before a verdict is rendered, and the (4) ability of nonjurors to report juror misconduct. *Id.* at 127. Thus, the Court concluded that the defendant's Sixth Amendment right to an unimpaired jury must yield to the policy interests behind insulating deliberations. *Id.*

Here, however, the four *Tanner* factors do not provide adequate safeguards in the context of a juror motivated by racial bias. *See Villar*, 586 F.3d at 87. First, racial bias, unlike intoxication, is not a visible characteristic observable by the court or counsel. *See id.*

Second, the majority suggests that the Sixth Amendment does not require Rule 606(b) to yield because there is "no reason to conclude that diligent voir dire would have left [defendant's] rights to a jury free of racial bias unprotected." However, Justices of the Supreme Court have recognized that the protections provided by voir dire are insufficient to protect against racial bias, because jurors may be reluctant to admit their bigotry in open court. *See, e.g.*,

McDonough, 464 U.S. at 558 (Brennan, J., concurring) ("the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it" (quoting *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring))); *see also Villar*, 586 F.3d at 87 & n.5. Accordingly, voir dire is an insufficient protection against racial bias.

Third, it is unlikely that jurors will report juror misconduct prior to the verdict, because they are usually instructed by the court not to communicate with anyone outside the jury. Here, the court orally instructed the jury, "[D]uring [deliberations] you will not be able to communicate with anyone." The court also referred to the "confidential" nature of deliberations, and repeated that the jurors were not allowed to talk to anyone besides other jurors. Similar instructions were given in the adjournment instructions, which every juror read and signed. The adjournment instructions additionally emphasized that the jurors could not contact any attorney, witness, or party. Accordingly, it is possible that the jurors believed that they could not bring Juror 11's statements to the court's attention until after deliberations ended.

Fourth, nonjurors are not privy to deliberations, and thus would be unable to report racially biased statements made during jury deliberations. *See Villar*, 586 F.3d at 87; *cf. United States v. Provenzano*, 620 F.2d 985, 996-97 (3d Cir. 1980) (court considered statement from U.S. Marshal who saw jury members smoking marijuana outside the jury room).

Thus, the *Tanner* procedural protections are insufficient safeguards against racial prejudice. Accordingly, I conclude that the policy considerations behind CRE 606(b) do not outweigh a defendant's Sixth Amendment right to a fair trial.[6]

Contrary to the majority's conclusion, I do not believe that finding CRE 606(b) unconstitutional as applied in this case would open a Pandora's box to charges of racially biased jurors participating in jury deliberations. There are no published cases in Colorado involving evidence of racial bias arising during deliberations which is first discovered after a verdict. Thus, it does not appear to be a common occurrence. Additionally, my view here is limited to allegations of juror bias against distinct racial groups.[7] *See generally Hernandez v. New York*, 500 U.S. 352 (1991) (expanding the *Batson* analysis from discrimination against African-American jurors to Hispanic jurors); *Washington v. People*, 186 P.3d 594, 601 (Colo. 2008) ("African-Americans and Hispanics are 'distinctive groups' for the purposes of a fair cross-section analysis." (quoting *United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001))).

IV. Remedy

Having concluded the trial court erred, I would remand for an evidentiary hearing to determine

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[6] For these same reasons, I conclude that *Benally* was decided improperly, and therefore I decline to rely on it.

[7] For purposes of my dissent, I need not address whether the Sixth Amendment right to an impartial jury should trump CRE 606(b) in cases of alleged discrimination by jurors on the basis of gender, religion, sexual orientation, or immigration status.

whether Pena-Rodriguez was prejudiced by Juror 11's apparent racial bias. *See Villar*, 586 F.3d at 87-88 (the trial court is best positioned to determine whether a defendant is prejudiced by racial bias during deliberations).

I would direct the trial court on remand to conduct an evidentiary hearing to determine, at the very least, (1) whether Juror 11 made the statements of apparent racial bias attributed to him in the two affidavits; (2) whether Juror 11 based his decision of guilt on racial bias rather than the facts presented, (3) whether Juror 11's statements affected the views of other jurors, and (4) whether any other juror expressed racial bias. I would defer to the trial court to determine the best procedure for making such a determination. *Id.* However, I recognize that the passage of time may cause difficulty in securing further juror testimony. Accordingly, it would be within the trial court's discretion to base its determination on juror testimony, the affidavits already in the record, or some combination of both.[8]

V. Juror Contact Information

Having decided that I would remand the case for further proceedings, I need not determine whether a defendant has a right to unfettered access to juror information following trial. However, under the plain wording of Crim. P. 24(a)(4), juror contact information in this case would be "appropriate and necessary."

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[8] While I would not order a specific procedure for the trial court to follow on remand, I would note that *Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010), provides a detailed example of one method of assessing juror bias.

Thus, without deciding the issue of whether an unfettered right to jury information exists, I would order the trial court to provide juror contact information to both parties to facilitate a complete investigation into potential bias. The trial court could limit defense counsel's contacts with jurors to the issue of racial bias.

Finally, providing such information in this case would not result in a "fishing expedition," because two juror affidavits already establish the possibility of a biased verdict.

Accordingly, I respectfully dissent.

APPENDIX C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 15, 2015 CASE NUMBER: 2013SC9
Certiorari to the Court of Appeals, 2011CA34 District Court, Arapahoe County, 2007CR2311	
Petitioner: Miguel Angel Pena-Rodriguez, **v.** **Respondent:** The People of the State of Colorado	Supreme Court Case No.: 2013SC9

ORDER OF COURT

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 15, 2015.

JUSTICE EID and JUSTICE MÁRQUEZ would grant the Petition.